35302

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1902.

Davis & Farnum Manufacturing Company, a corporation,
Appellant,

vs.

City of Los Angeles, a municipal corporation,
Appellee.

BRIEF AND ARGUMENT ON BEHALF OF APPELLANT.

May it Please Your Honors:

There are two general questions to be decided in this case:

First—Whether the ordinance of the City of Los Angeles adopted on the 3rd day of March, 1902, amending the ordinance of August 26th, 1901, in reference to the erection or maintenance of gas works within certain portions of the City of Los Angeles is valid and binding upon the complainant, contractor of Caroline W. Dobbins, engaged in the business of erecting gas works upon the premises of the said

Caroline W. Dobbins as depriving it of the right to conduct a lawful business of erecting gas works and denying to it, with said Caroline W. Dobbins, the equal protection of the laws, with all other persons within the jurisdiction of said municipality, and as against vested rights which Caroline W. Dobbins and said complainant under her, had acquired in reference thereto by virtue of legislative authority, and as depriving said Caroline W. Dobbins and said complainant under her thereof without due process of law.

Second—Whether a court of equity has jurisdiction to restrain by injunction a municipality from instituting criminal proceedings, when such prosecutions are threatened or instituted under color of an invalid ordinance for the purpose of compelling the relinquishment of a property right.

We shall discuss these questions in the order of their statement for the reason that if the ordinance is invalid and interferes with the right of the complainant to conduct a lawful business, or with its vested rights or those of its employer, which she, or the complainant under her, has acquired by virtue of legislative authority, it will follow that a court of equity has jurisdiction to restrain by injunction the defendant municipality from instituting and prosecuting the criminal proceedings threatened or instituted under color of such invalid ordinances for the purpose of compelling the relinquishment of the property rights of the complainant or its employer. A crime or offense for which an offender can be prosecuted is not created by an invalid law or ordinance. Every arrest under such an ordinance is a lawless and forcible

trespass, and a court of equity will restrain a trespasser from coercing submission to lawless demands by prosecutions for alleged crimes before courts which have no jurisdiction to try the accusation.

STATEMENT OF THE CASE.

This was a bill in equity filed in the Circuit Court of the United States for the Southern District of California, Ninth Circuit, by the appellant, Davis & Farnum Manufacturing Company, a citizen of the state of Massachusetts against the appellee, the City of Los Angeles, a municipal corporation and a citizen of the state of California, for the purpose of obtaining an injunction to restrain the City of Los Angeles from enforcing a certain ordinance adopted by the City Council of the City of Los Angeles, March 3rd, 1902, amending an ordinance adopted August 26th, 1901, in reference to the erection or maintenance of gas works, gas tanks or reservoirs within certain limits of the City of Los Angeles, on the ground that such ordinance was in violation of the Federal Constitution because it deprived the complainant of the right to conduct a lawful business of erecting gas works and manufacturing gas and denying to it and its employer the equal protection of the laws, with all other persons within the jurisdiction of said municipality, and because the ordinance of March 3rd, 1902, impaired the vested rights which the said Caroline W. Dobbins and the complainant as a contractor under her had acquired under legislative authority from the City of Los Angeles, and because said amended ordinance deprived the said complainant as a contractor of said

Caroline W. Dobbins of its property without due process of law.

The Circuit Court denied the prayer of said complaint and refused to grant an injunction for the reason given in the opinion filed by the District Judge who held that a court of equity was without jurisdiction to enjoin criminal prosecutions under a statute or ordinance alleged to be unconstitutional and void, even though it was also alleged that it was the purpose of such prosecutions to injure complainant in its property rights and that such would be their effect.

This litigation arises out of the passage by the City of Los Angeles of certain ordinances attempting to prohibit the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of said city and out of the different contentions of the parties as to the character and validity of those ordinances.

The complainant avers in its bill that on the 26th day of August, 1901, the City Council of the City of Los Angeles passed an ordinance, number 6663, as follows:

> An Ordinance prohibiting the erection or maintenance of gas-works, gas tanks or reservoirs within certain portions of the City of Los Angeles:
>
> The Mayor and Council of the City of Los Angeles do ordain as follows:
>
> SECTION 1. It shall be unlawful for any person firm or corporation to erect or cause to be erected, maintain or cause to be maintained, any works, establishment or manufactory for the manufacture of gas; or any tank, reservoir or other receptacle for the storage of gas within the

corporate limits of the City of Los Angeles, outside of the limits of the district described as follows, to wit:

Beginning at the intersection of the center line of the official bed of the Los Angeles river with the south charter boundary line of the City of Los Angeles; thence westerly along said south charter boundary line to the center line of Santa Fe avenue; thence northerly along the center line of Santa Fe avenue to the center line of Violet street; thence westerly along the center line of Violet street to the center line of Wilson street; thence northerly along the center line of Wilson street to the center line of Atlantic street; thence westerly along the center line of Atlantic street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of Palmetto street; thence easterly along the center line of Palmetto street to the center line of Molino street; thence northerly along the center line of Molino street to the center line of Fourth street; thence easterly along the center line of Fourth street to the prolonged center line of Santa Fe avenue; thence northerly along said prolonged center line of Santa Fe avenue to the center line of First street; thence easterly along the center line of First street to the center line of Center street; thence northerly along the center line of Center street to the center line of Aliso street; thence westerly along the center line of Aliso street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of San Fernando street; thence easterly along the center line of San Fernando street to the center line of the official bed of the Los Angeles river; thence southerly along the official bed of the Los Angeles river to the point of beginning.

Section 2. Any person, firm or corporation who shall violate any of the provisions of this Ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof shall be

punished by a fine of not less than One Hundred Dollars ($100) nor more than Five Hundred Dollars ($500) or by imprisonment in the City Jail for not less than Thirty (30) days nor more than One Hundred (100) days, or by both such fine and imprisonment. Every day that such gas works, tank or reservoir is maintaned in violation of the provisions of this Ordinance, shall be deemed a separate offense within the meaning of this Ordinance.

Section 3. Ordinance No. 174 approved July 2nd, 1885, and all other ordinances or parts of ordinances in conflict herewith are hereby repealed.

Section 4. The City Clerk shall certify to the passage of this Ordinance and cause the same to be published once in The Los Angeles Daily Journal and thereupon and thereafter it shall take effect and be in force.

Specifically the ordinance provides that it is unlawful for any person, firm or corporation to erect or cause to be erected, maintain or cause to be maintained, any works, establishment or manufactory for the manufacture of gas or any tank, reservoir or other receptacle for the storage of gas within the corporate limits of the City of Los Angeles outside of the district described in the ordinance. That district as originally laid out, included the district bounded on the north by San Fernando street, on the east by the Los Angeles river, making an apex at the junction of San Fernando street and the Los Angeles river, and on the south by the boundary of the city limits. The western boundary was an irregular line, and as we claim, was laid out and described for the purpose of protecting the existing works of the Los Angeles Lighting Company, and was bounded and designated

without regard to any geographical or natural lines, but simply described for the purpose of running around and including the present gas works of the Los Angeles Lighting Company in the City of Los Angeles. The violation of this ordinance was made a misdemeanor, punishable by fine or imprisonment, or both, and every day that such gas works, tank or reservoir should be maintained in violation of the purposes of said ordinance, should be deemed a separate offense within the meaning thereof.

Complainant alleged that on or about the first day of September, 1901, one Caroline W. Dobbins, a citizen of the state of California, in said district, made and entered into a certain contract with the Valley Gas & Fuel Company, a corporation duly organized and doing business under and by virtue of the laws of the state of California for the purpose, among other things, of erecting gas works, to build, construct and erect for the said Caroline W. Dobbins on certain premises to be designated by her in the City of Los Angeles and on certain premises owned by her, as hereinafter described, certain gas works, including all things necessary for the manufacture, recovery and storage of gas; that in order to enable the said Valley Gas & Fuel Company to carry out the said contract with the said Caroline W. Dobbins, complainant on or about the 17th day of September, 1901, at Waltham in the state of Massachusetts, entered into a certain contract with the said Valley Gas & Fuel Company to erect on those certain premises in the City of Los Angeles to be designated by the said Caroline W. Dobbins, certain portions of certain gas

works for the manufacture, recovery and storage of gas, consisting more particularly of a certain water tank and gas holder, said water tank and gas holder to be laid upon the cement foundations prepared by the Valley Gas & Fuel Company, to be 62 feet in diameter by 20 feet, 9 inches in height, and with a capacity of about 467,700 gallons of water; said tank to be made of sheet steel and iron; to have steel bottoms thoroughly rivetted and made water tight having a textile strength of 62,000 pounds to the square foot. Inside of said water tank was to be erected a steel gas holder with a capacity of 100,000 cubic feet of gas, consisting of two lifts with proper curbs and cups, in a good and workmanlike manner at a cost of $13,685.

Complainant averred that immediately on the entering into of said contract it commenced at its manufactory in the city of Waltham, aforesaid, the construction of said water tank and gas holder and the building of the necessary machinery to be used in connection therewith, and prepared and foundered the necessary iron and steel to be used therein; that as soon as the same was completed at said foundry, the same was forwarded from the city of Waltham in said state of Massachusetts by railroad transportation to the city of Los Angeles and delivered upon the premises of the said Caroline W. Dobbins in the complaint particularly described, and by her designated for that purpose; that since the arrival of said iron and steel on said premises as aforesaid, complainant employed divers and sundry men and skilled mechanics at great expense to complainant, bringing said

men from different parts of the United States, from Trenton, New Jersey, from Philadelphia, Pa., from Toledo, Ohio, and from San Francisco, California, and from other places for the purpose of putting together and erecting the said water tank and gas holder with the steel so made and furnished by the complainant as aforesaid, and pursuant to the contract aforesaid; that complainant commenced the said water tank and gas holder and had so far completed the same that at the time of the filing of said complaint said water tank was erected 15 feet 9 inches in height, and if complainant was allowed to go on with said work without interruption and interference from the defendant, the said water tank would in the course of a week or ten days be fully completed by complainant according to its contract with the Valley Gas & Fuel Company. It was averred that complainant was ready and willing and able with said men and with said steel and iron to complete the erection of said gas holder and fulfill and carry out on its part the terms of said contract so entered into between complainant and the Valley Gas & Fuel Company.

Complainant further averred that after the passage of the ordinance of August 26th, 1901, hereinbefore set forth, within the territory of the City of Los Angeles within which, by said ordinance, it was lawful to erect or maintain gas works, gas tanks or reservoirs for the manufacture of gas, and on or about the 28th day of September, 1901, said Caroline W. Dobbins, for the purpose of erecting gas works, purchased a tract of land consisting of three lots and a half and known as lots sixteen, seventeen and eighteen, and

part of lot fifteen of block two Pomeroy & Mill's subdivision of the Hollenbeck Tract, described in the bill of complaint filed herein.

On the first day of November following, Mrs. Dobbins applied to the Board of Fire Commissioners of the City of Los Angeles for a permit to erect and maintain gas works on said premises under what is known as the "Building Ordinance of the City of Los Angeles," which required that the person desiring to erect gas works within the City of Los Angeles should first secure from the Board of Fire Commissioners a permit so to do. This ordinance gave the Fire Commissioners, upon a hearing of all parties interested, authority to grant or refuse such permit.

Upon the application of Mrs. Dobbins to the Board of Fire Commissioners for such a permit, notices were properly given of the hearing in accordance with the ordinance to all persons interested, and on the 8th day of November, 1901, a hearing was had before the Board of Fire Commissioners. The Board of Fire Commissioners gave an opportunity to all persons interested to be heard, and having taken the matter under advisement, afterwards, on the 22nd day of November, 1901, the application of the said Caroline W. Dobbins for permission to erect and maintain a gas works was granted.

Mrs. Dobbins, having fully complied with all the ordinances then in force in the City of Los Angeles in reference to the erection of gas works, both as to the place of their erection and as to the securing of a permit from the proper authorities therefor, commenced the construction of the gas works

upon the premises which she had purchased within the district in which it was lawful to erect gas works under the ordinance of August 26th, 1901, and by virtue of the permit granted by the Board of Fire Commissioners. Contracts were immediately let with certain persons for the erection of certain portions of said gas works and more particularly for the laying of the cement foundations for the said water tank and gas holder to be erected thereon by the said complainant. Pursuant to said contracts the foundations for said gas holder and water tank and also the foundations for other portions of said work were laid at a cost of upwards of $2500; said foundations were of great strength and very costly material and if the same should have to be destroyed or removed it would cause irreparable damage and injury to the said Caroline W. Dobbins, the Valley Gas & Fuel Company and to complainant, as under the contract between the complainant and the Valley Gas & Fuel Company to erect thereupon the water tank and gas holder aforesaid, complainant would not be able to complete said contract so entered into as in said complaint described.

After the material had all been placed upon the ground for the erection of these foundations, and the foundations were nearly completed, on the 25th day of November, 1901, the City Council of the City of Los Angeles attempted to pass a purported ordinance entitled "An ordinance amending ordinance number 6663, new series, entitled 'An ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the city of

Los Angeles, approved August 26th, 1901, by amending Section one of said ordinance." Said purported ordinance is in words and figures as follows:

ORDINANCE NO. 6779.

(New Series.)

An Ordinance amending Ordinance No. 6663, New Series, entitled "An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles," approved August 26, 1901, by amending Section 1 of said Ordinance.

The Mayor and Council of the City of Los Angeles do ordain as follows:

Section 1. That Section 1 of Ordinance No. 6663, New Series, entitled "An Ordinance prohibiting the erection or maintenance of gas works, gas tanks, or reservoirs within certain portions of the City of Los Angeles," approved August 26th, 1901, be and the same is hereby amended to read as follows:

Section 1. It shall be unlawful for any person, firm or corporation to erect or cause to be erected, maintain or cause to be maintained any works, establishment or manufactory for the manufacture of gas, or any tank, reservoir or other receptacle for the storage of gas within the corporate limits of the City of Los Angeles, outside of the limits of the district described as follows, to wit:

Beginning at the intersection of the center line of the official bed of the Los Angeles river with the south charter boundary line of the City of Los Angeles; thence westerly along said south charter boundary line to the center line of Santa Fe avenue; thence northerly along the center line of Santa Fe avenue to the center line of Violet street; thence westerly along the center line of Violet street to the center line of Wilson street;

thence northerly along the center line of Wilson street to the center line of Atlantic street; thence westerly along the center line of Atlantic street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of Palmetto street; thence easterly along the center line of Palmetto street to the center line of Molino street; thence northerly along the center line of Molino street to the center line of Fourth street; thence easterly along the center line of Fourth street to the prolonged center line of Santa Fe avenue; thence northerly along said prolonged center line of Santa Fe avenue to the center line of First street; thence easterly along the center line of First street to the center line of Center street; thence northerly along the center line of Center street to the center line of Aliso street; thence westerly along the center line of Aliso street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of San Fernando street; thence southeasterly following the line of the Southern Pacific Railway on Redondo street and Alhambra avenue to the official bed of the Los Angeles river; thence southerly along the official bed of the Los Angeles river to the point of beginning.

Section 2. The City Clerk shall certify to the passage of this Ordinance and shall cause the same to be published once in The Los Angeles Daily Journal, and thereupon and thereafter it shall take effect and be in force.

By this ordinance an attempt was made to cut out and eliminate from the territory described in the ordinance of August 26th, 1901, the land that had been purchased by Mrs. Dobbins, and being the premises on which she was erecting the gas works under her permit from the Board of Fire Commissioners and upon which premises the complainant was erecting

the water tank and gas holder under its contract with the Valley Gas & Fuel Company.

From the time of the granting of the permit to the said Caroline W. Dobbins by the Board of Fire Commissioners of the City of Los Angeles on the 22nd day of November, 1901, and until the 25th day of February, 1902, the Valley Gas & Fuel Company was peaceably and lawfully engaged in the erection of the gas works for said Caroline W. Dobbins upon the premises aforesaid and complainant was peaceably and lawfully engaged in the erection of the water tank and gas holder hereinbefore described and nothing was done by the City of Los Angeles in reference to the enforcement of this alleged ordinance of November 25th, 1901, until about the 25th day of February, 1902, when the City of Los Angeles combining and confederating with one James R. C. Burton and with divers and sundry persons to complainant unknown, in the name of the people of the state of California, instituted a proceeding in the police court of the City of Los Angeles against F. A. Smith and Thaddeus Lowe, then in the employ of the Valley Gas & Fuel Company, in the erection of said gas works on the premises of the said Caroline W. Dobbins as hereinbefore described, charging the said F. A. Smith and the said Thaddeus Lowe with having committed a misdemeanor in that they did wilfully and unlawfully erect and cause to be erected certain works, establishments and manufactories for the manufacture of gas, and a certain tank, reservoir and receptacle for the storage of gas within the corporate limits of the said city of Los Angeles described in said

purported ordinance, attempted to be passed by the City Council of the City of Los Angeles on the 25th day of November, 1901, last hereinbefore referred to, and thereupon, upon the complaint filed in said proceeding in said Police Court of the City of Los Angeles, on the 27th day of February, 1902, caused the arrest and detention of said Thaddeus Lowe and F. A. Smith upon a warrant issued by the Judge of said Police Court of the City of Los Angeles, for the alleged violation of said city ordinance.

On the first day of March, 1902, the City of Los Angeles, again combining and confederating with the said James R. C. Burton and with divers and sundry persons to the complainant unknown, instituted another proceeding in the Police Court of the City of Los Angeles against the said F. A. Smith, Thaddeus Lowe and four other persons then and there in the employ of the said Valley Gas & Fuel Company in the erection of said works on the premises of the said Caroline W. Dobbins hereinbefore described, engaged in carrying out said contract on behalf of the said Valley Gas & Fuel Company with the said Caroline W. Dobbins, charging them as in the last complaint described; and on the first day of March, 1902, caused the arrest and detention of the said F. A. Smith, Thaddeus Lowe and the four other persons then mentioned in the warrant issued by the Judge of the said Police Court of the City of Los Angeles, for the violation of said ordinance.

That afterwards, on the first day of March, 1902, the said defendant, the City of Los Angeles, again

combining and confederating with the said James R. C. Burton and with divers and sundry other persons to the complainant unknown, in the name of the people of the state of California, instituted another proceeding in the Police Court of the City of Los Angeles against the said F. A. Smith, Thaddeus Lowe and fourteen other persons then and there in the employ of the Valley Gas & Fuel Company and in the employ of the complainant in the erection of the said gas works on the premises of the said Caroline W. Dobbins, hereinbefore described, in the carrying out of the said contract between complainant and the Valley Gas & Fuel Company and of the contract between the Valley Gas & Fuel Company and Caroline W. Dobbins aforesaid, charging the said persons in said complaint named with having committed a misdemeanor as in said first complaint alleged, and thereupon, upon the first day of March, 1902, caused the arrest and detention of said persons in said complaint mentioned, sixteen persons in all, upon a warrant issued by the Judge of the said Police Court of the City of Los Angeles for the alleged violation of the said alleged city ordinance last hereinbefore set forth.

Complainant averred that the arrest and detention of the said employees of complainant seriously interfered with and interrupted the work of complainant in carrying out its said contract so entered into with the Valley Gas & Fuel Company and was in violation of the rights of the complainant as acquired under and by the said contract.

Complainant set forth that on the 3rd day of March, 1902, the City of Los Angeles recogniz-

ing the invalidity of the alleged ordinance attempted to be passed and adopted by the City Council of the City of Los Angeles November 25th, 1901, as hereinbefore set forth, attempted by its Mayor and council to pass another purported ordinance entitled "An ordinance amending ordinance number 6663, new series, entitled 'An ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs, within certain portions of the City of Los Angeles' approved August 26th, 1901, by amending section one of said ordinance," which said purported ordinance is in words and figures as follows:

ORDINANCE NO. 7029.

(New Series.)

An Ordinance amending Ordinance No. 6663, New Series, entitled, "An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles," approved August 26, 1901, by amending section 1 of said Ordinance.

The Mayor and Council of the City of Los Angeles do ordain as follows:

Section 1. That section 1 of Ordinance No. 6663, New Series, entitled, "An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles," approved August 26, 1901, be and the same is hereby amended to read as follows:

Section 1. It shall be unlawful for any person, firm or corporation to erect or cause to be erected, maintain or cause to be maintained, any works, establishment or manufactory for the manufacture of gas; or any tank, reservoir or

other receptable for the storage of gas within the corporate limits of the City of Los Angeles, outside of the limits of the district described as follows, to-wit:

Beginning at the intersection of the center line of the official bed of the Los Angeles River with the south charter boundary line of the City of Los Angeles; thence westerly along said south charter boundary line to the center line of Santa Fe avenue; thence northerly along the center line of Santa Fe avenue to the center line of Violet street; thence westerly along the center line of Violet street to the center line of Wilson street; thence northerly along the center line of Wilson street to the Center line of Atlantic street; thence westerly along the center line of Atlantic street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of Palmetto street; thence easterly along the center line of Palmetto street to the center line of Molino street; thence northerly along the center line of Molino street to the center line of Fourth street; thence easterly along the center line of Fourth street to the prolongation southerly of the center line of Santa Fe avenue; thence northerly along said prolonged center line of Santa Fe avenue and along the center line of Santa Fe avenue to the center line of First street; thence easterly along the center line of First street to the center line of Center street; thence northerly along the center line of Center street to the center line of Aliso street; thence westerly along the center line of Aliso street to the center line of Alameda street; thence northerly along the center line of Alameda street to Main street; thence along Main street to the intersection of Main and San Fernando streets; thence northeasterly along the center line of San Fernando street to the center line of Redondo street; thence southeasterly, following the line of the Southern Pacific railway on Redondo street and Alhambra avenue to the official bed

of the Los Angeles river; thence southerly along the official bed of the Los Angeles river to the point of beginning.

The avenue designated herein as Santa Fe avenue, is the avenue lying in the district bounded by the Los Angeles river on the east and Alameda street on the west, and extending in a northerly and southerly direction between these two lines.

Section 2. The City Clerk shall certify to the passage of this Ordinance and shall cause the same to be published once in the Los Angeles Daily Journal, and thereupon and thereafter it shall take effect and be in force.

Complainant alleged that by the passage of this ordinance of March 3rd, 1902, the ordinance of November 25th, 1901, was repealed and was no longer in force and effect.

Complainant averred that it was endeavoring in all respects to carry out and perform its contract with the Valley Gas & Fuel Company and to erect on the premises of the said Caroline W. Dobbins aforesaid the said water tank and gas holder provided for in the contract between complainant and the Valley Gas & Fuel Company, to be used in the erection of the gas works by the Valley Gas & Fuel Company for the said Caroline W. Dobbins, but that the City of Los Angeles, combining and confederating with the said James R. C. Burton and with divers and sundry other persons to the complainant unknown, threatened in the name of the people of the state of California to institute another proceeding in the Police Court of the City of Los Angeles against the employees of complainant and other persons engaged in the erection of said gas works on the premises of the said Caroline W. Dob-

bins, in the employ of the Valley Gas & Fuel Company, in carrying out the contract on behalf of the Valley Gas & Fuel Company with the said Caroline W. Dobbins, and threatened to charge the said employees of complainant with having committed a misdemeanor, charging them and each of them with wilfully and unlawfully erecting or causing to be erected certain works, establishments and manufactory for the manufacture of gas and a certain tank, reservoir and receptacle for the storage of gas within the corporate limits of the City of Los Angeles, and outside of the limits described in said purported ordinance attempted to be passed by the City Council of the City of Los Angeles on the 3rd day of March, 1902, last hereinbefore set forth; and that the City of Los Angeles threatened to cause the arrest and detention of said employees and all other employees of the said complainant engaged in the erection and construction of said water tank and gas holder as hereinbefore set forth, and to imprison and confine the said employees of the complainant for the alleged violation of the said city ordinance.

It is averred that said City of Los Angeles threatens that if the complainant continues to carry on its work in which it is engaged in completing said water tank and gas holder under its contract with the Valley Gas and Fuel Company, that it will arrest all persons employed by complainant engaged in said work until it will have stopped the business of complainant and the performance by complainant of its work in carrying out its contract and will arrest the men employed by the complainant as often as they shall be

found at work for said complainant upon said undertaking, charging them with a violation of said alleged ordinance last aforesaid; and complainant charged that unless the City of Los Angeles was restrained and enjoined by the Circuit Court from carrying out its said threats that the said City of Los Angeles would arrest and continue to arrest the men employed by complainant in conducting its business in the erection of said water tank and gas holder and in carrying out its said contract with the Valley Gas & Fuel Company until said work was stopped.

By an amendment filed to said complaint by leave of Court complainant alleged that ever since the inception of the said enterprise so instituted, commenced and undertaken by the said Caroline W. Dobbins the said defendant, the City of Los Angeles, and the municipal authorities thereof, its officers and agents, have continuously thrown obstacles in the way of the successful completion of the said enterprise of the said Caroline W. Dobbins, and have continuously and systematically attempted to thwart and frustrate the plans of the said Caroline W. Dobbins; and have interfered with and interrupted her said work in various portions thereof, that immediately after the organization, at the instance of and for the benefit of the said Caroline W. Dobbins of the said Valley Gas & Fuel Company, the said City Council of the City of Los Angeles attempted to pass and adopt the Ordinance number 6663, New Series, which was adopted on the 26th day of August, 1901, as aforesaid, entitled "An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or

reservoirs within certain portions of the City of Los Angeles;" and afterwards, when the said Caroline W. Dobbins had purchased, within the district prescribed by the said ordinance last hereinbefore referred to, the land upon which she proposed to erect the said gas works, and when, on or about the 28th day of September, 1901, an application had been made to the Board of Fire Commissioners of the City of Los Angeles for a permit to erect gas works upon said premises, the said City Council considered and deliberated upon an ordinance then and there introduced in said City Council of the City of Los Angeles, entitled "An Ordinance amending Ordinance No. 6663, New Series, entitled 'An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles,' approved August 26, 1901, by amending section 1 of said ordinance," the object of said ordinance being to further restrict the limits of the district in the City of Los Angeles in which it was lawful to erect and maintain gas works, by which said ordinance it was proposed to eliminate from the district theretofore described in the alleged ordinance adopted on the 26th of August, 1901, all that portion of said district lying between San Fernando street on the north and west, Sotello street and Leroy street on the south and west, and the Los Angeles river on the east, in which particularly was situated the land owned and purchased by the said Caroline W. Dobbins as aforesaid, and upon which it was proposed by the said Caro-

line W. Dobbins to erect the said gas works; that such proceedings were had in the said City Council of the City of Los Angeles on the presentation and consideration of said ordinance that the same was by the said City Council referred to the Committee on Legislation of said City Council, and thereupon the hearing upon the application theretofore made to the said Board of Fire Commissioners was suspended, and the same continued entirely suspended by the said Board of Fire Commissioners while the said matter was pending before the said Committee on Legislation of the said City Council of the City of Los Angeles, and for upwards of two weeks; that during the time that said application for a permit to erect gas works upon the premises of the said Caroline W. Dobbins above referred to was still pending before the said Board of Fire Commissioners as aforesaid, and while the question of the adoption of the said proposed ordinance was still pending before the said Legislative Committee of the said City Council, the said Board of Fire Commissioners were induced to consider and did consider and agree to the adoption of a certain rule and regulation in reference to applications for permits to erect gas works, which said rule and regulation is hereinafter referred to; that after such determination of the said Board of Fire Commissioners to adopt said rule and regulation hereinafter referred to, said proposed ordinance proposing to restrict the limits of said district in which it was lawful to erect gas works as aforesaid came before the said City Council of the City of Los Angeles on

the report of the said Legislative Committee, the said Legislative Committee having reported against the adoption of the said ordinance; and thereupon, at the next meeting of the said Board of Fire Commissioners of the City of Los Angeles the said rule and regulation hereinafter referred to, having theretofore been considered by the said Board of Fire Commissioners as aforesaid, was, at the meeting of the Board of Fire Commissioners on or about the 25th day of October, 1901, adopted, in words and figures as follows: "Whereas, applications are on file with this Board for permission to erect gas manufacturing plants at different points within the district to which said plants are limited; and, whereas, a very great majority of the property owners living in the vicinity of locations for which applications are made protest against the granting of permits; and, whereas, this Board is satisfied that the respective applicants for permission to build are attempting to engage in the business of the distribution of gas for general purposes, including its use for fuel and power, without first procuring a franchise from the city for said right; now, therefore, be it resolved, that all applications now pending before this Board for permission to erect gas manufacturing plants are hereby denied; that, hereafter, in all cases where an application for permission to erect a gas manufacturing plant shall be made to this commission the said application shall state whether or not the gas so manufactured is to be supplied to the inhabitants of the City of Los Angeles for illuminating purposes only. Said application shall be verified by the oath of the applicant, and in case it shall appear to the commission that no proper ground exists for the denial of the application, and that said gas is to be used for illuminating purposes only, the same shall be forthwith granted. But in case it shall appear that the gas is to be furnished for general purposes, such as fuel, power, etc., then the applicant therefor must procure a franchise from the City of Los Angeles to distri-

bute gas before his said application will be finally granted by this commission," the effect of which rule was to dismiss and deny the application theretofore made for permission to erect gas works upon the premises of the said Caroline W. Dobbins as hereinbefore set forth; that afterwards, on the 1st day of November, 1901, the said Caroline W. Dobbins having complied with all the rules and regulations of the said Board of Fire Commissioners, made an application on her own behalf for a permit to erect gas works upon said premises hereinbefore described, and afterwards, on the 22nd day of November, 1901, the said Board of Fire Commissioners granted the said permit to the said Caroline W. Dobbins as hereinbefore set forth, and thereupon the said City Council of the City of Los Angeles, as soon thereafter as they met, to-wit, on the 25th day of November, 1901, attempted to pass and adopt the ordinance No. 6779, New Series, entitled "An Ordinance amending Ordinance No. 6663, New Series, entitled 'An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles,' approved August 26, 1901, by amending section 1 of said ordinance," as hereinbefore set forth; that in addition to the acts of the said municipal authorities of the said City of Los Angeles hereinbefore set forth, on or about the 7th day of October, 1901, the said City Council of the City of Los Angeles attempted to pass a certain other purported ordinance known as Ordinance No. 6726, New Series, entitled "An Ordinance prohibiting the use of any public street or thorough-

fare in the City of Los Angeles for the purpose of laying down or maintaining therein any pipe, conduit or connections therewith without a franchise," wherein and whereby the said City of Los Angeles attempted to ordain that it should be unlawful for any person, firm or corporation to lay down any pipe, conduit or connections therewith in any public street or thoroughfare in the City of Los Angeles for the purpose of supplying said city or its inhabitants with fresh water or with gas used exclusively for illumination or with other illuminating light, without first obtaining a permit from the Superintendent of Streets to make the necessary excavations therefor, and that any person, firm or corporation desiring to obtain such permit should file with the Superintendent of Streets an application therefor in writing, setting forth the public streets or thoroughfares and the particular portions thereof which it was desired to excavate, the size and character of the excavation to be made, and specifically the purpose for which the pipe, conduit or connection therewith was to be used, whether for water, gas or electricity, and if for gas or electricity that said gas or electricity was to be supplied solely to said city or its inhabitants to be used exclusively for illumination, and that said application must be verified by the oath of such person, or by the oath of a member of such firm or by the oath of the president and secretary of such corporation as the case may be; that thereafter, when the said Caroline W. Dobbins desired to make an application for permit to excavate the streets of the City of Los Angeles for the

purpose of laying pipes in order to distribute to the citizens of the City of Los Angeles gas by her to be manufactured, for the purpose of supplying them with artificial light, the Superintendent of Streets of the City of Los Angeles unlawfully required of the said Caroline W. Dobbins an application therefor in writing, setting forth the public streets and thoroughfares, and the particular portions thereof, which it was desired by the said plaintiff to excavate, the size and character of the excavations to be made, and specifying the purpose for which the pipe, conduit or connections therewith was to be used, and that said gas was to be supplied solely for the city or its inhabitants to be used exclusively for illumination, and required that the said application should be verified by the oath of the said Caroline W. Dobbins, all of which requirements were unlawful and were for the purpose of annoying, harrassing, impeding, hindering and delaying the said Caroline W. Dobbins in her attempt to carry out successfully the lawful enterprise in which she was engaged; that thereafter, in addition to the adoption of the said purported ordinance so attempted to be adopted by the City Council of the City of Los Angeles, and in addition to the acts of the said Superintendent of Streets of the City of Los Angeles hereinbefore set forth, the said City of Los Angeles, through its City Attorney, prosecuted the proceedings instituted by the said James R. C. Burton hereinbefore set forth for the arrest of and detention of the men employed in the construction and erection of the said gas works of the said Caroline W. Dobbins, all

of which acts and doings on the part of the City of Los Angeles, its municipal authorities, officers and agents as hereinbefore set forth the said complainant charged and averred were for the purpose of hindering, harrassing, impeding, delaying and frustrating the efforts and attempts of the said complainant and said Caroline W. Dobbins to carry out the lawful business and enterprise so undertaken by her as aforesaid, and were instituted and prosecuted for the purpose of compelling the said complainant and the said Caroline W. Dobbins to stop and abandon the further prosecution of said enterprise.

It is alleged in said complaint upon information and belief that the said defendant, the City of Los Angeles and the municipal authorities, officers and employes thereof were in their acts and doings hereinbefore set forth wilfully and unlawfully instigated, advised and controlled by the officers, attorneys, agents and employes of the Los Angeles Lighting Company, a corporation organized under the laws of the State of California, engaged in the manufacture and supplying of gas in the City of Los Angeles, and which said company has, for upwards of ten years last past, enjoyed a monopoly of the gas business in the said City of Los Angeles; that said Los Angeles Lighting Company, through its officers, attorneys, agents and employes, has had sufficient influence with the municipal government of the City of Los Angeles, and with its officers, to bring about the passage and adoption of the alleged ordinances hereinbefore set forth, which the said City Council of the City of Los Angeles has attempted to adopt since the com-

mencement of the enterprise undertaken by the said Caroline W. Dobbins and has had sufficient influence with the officers and employes of the said City of Los Angeles to compel them to enforce and attempt to enforce the alleged ordinances so attempted to be passed and adopted by the City Council of the City of Los Angeles as aforesaid against the said Caroline W. Dobbins, her agents, contractors and employes engaged in the erection of said gas works and the laying of pipes in the streets of the City of Los Angeles on behalf of the said Caroline W. Dobbins in enabling her to carry out the enterprise aforesaid; that all of said ordinances attempted to be passed and adopted by the City Council of the City of Los Angeles restricting the limits of the City of Los Angeles in which it was lawful to erect gas works as prescribed by the ordinance adopted by the City Council of the City of Los Angeles on the 26th day of August, 1901, herein set forth, were prepared by the attorneys and agents of the said Los Angeles Lighting Company and by them presented to the members of the City Council of the City of Los Angeles for adoption; that before the attempted adoption of the said alleged ordinance of the 25th day of November, 1901, hereinbefore set forth, the said Los Angeles Lighting Company, through its attorneys and agents, in order to comply with the rules and regulations of the said City Council that before the passage of any ordinance a printed copy thereof should be furnished to each of the members of the City Council of the said City of Los Angeles, caused to be printed and dis-

tributed to the members of the City Council of the City of Los Angeles, printed copies of the proposed ordinance, which the said City Council afterwards, on the 25th day of November, 1901, attempted to adopt and pass as aforesaid; that the said Street Superintendent of the City of Los Angeles, under the restrictions purporting to be placed upon him by the City Council of the City of Los Angeles by the attempted adoption of the alleged ordinance number 6726, New Series, last herein referred to, being compelled to demand of the said Caroline W. Dobbins a verified application for a permit to open the streets of the City of Los Angeles for the purpose of laying pipes therein for the purpose of distributing gas by her to be manufactured, contrary to the rights of the said Caroline W. Dobbins to use the streets of the said City of Los Angeles for the purpose of laying pipes therein, as guaranteed to her by section 19, article XI, of the constitution of the State of California, thereupon the said Los Angeles Lighting Company, its agents and employes, caused to be and had printed and caused to be delivered by its agents to the said Superintendent of Streets of the City of Los Angeles, printed blanks prepared by their attorneys for applications for permits to excavate in public streets of the City of Los Angeles; that the said Los Angeles Lighting Company, its officers and agents, combining and confederating with the said James R. C. Burton and with divers and sundry persons to the said complainant unknown, have compelled the City Attorney of the City of Los Angeles and his

deputies and assistants to prepare the complaints in the proceedings instituted by the said James R. C. Burton in the name of the People of the State of California against the employes of the said Caroline W. Dobbins and her said contractor, the complainant, engaged in the erection of the said gas works as hereinbefore set forth, and have induced the filing of said complaints and the issuance of the warrants thereon and the arrest and imprisonment and detention by the officers of the City of Los Angeles of the said employes; and that the said Los Angeles Lighting Company, by its officers, attorneys, agents and employes, has boasted and threatened that if the said prosecutions so instituted by the said James R. C. Burton against the employes of the said Caroline W. Dobbins and her said contractors shall fail, and if the said ordinances hereinbefore set forth shall be declared void and invalid, they will, by their influence, and their efforts, secure the passage by the City Council of the City of Los Angeles of an ordinance regulating the gas business in the City of Los Angeles and requiring the payment of a license, which license they have boasted and threatened shall be prohibitory in its nature and so high as to prevent the said Caroline W. Dobbins from carrying on the business of manufacturing and distributing gas within the City of Los Angeles.

Complainant further alleges that each and every of the acts aforesaid so performed by the City of Los Angeles, its officers, agents and employes, were done and performed, not for the purpose of protecting any

public interest or preserving any public right, but that said acts and each of them were suggested and formulated by the said Los Angeles Lighting Company, its officers, attorneys, agents and employes, solely for the purpose of protecting the said Los Angeles Lighting Company in the enjoyment of that monopoly which has continued for upwards of ten years, as hereinbefore alleged, and for the purpose of depriving the said Caroline W. Dobbins of vested rights in property and of the privilege of pursuing her lawful undertaking and enterprise as the same is hereinbefore specifically set forth.

It is further alleged that the territory surrounding the premises of the said Caroline W. Dobbins hereinbefore described, in which the said gas works of the said Caroline W. Dobbins are being erected and which was by ordinance No. 6663, New Series, hereinbefore set forth, a portion of the territory within which the City of Los Angeles permitted the maintenance of gas works, is and was a district devoted to manufacturing and commercial enterprises almost exclusively; that in said district prior to the purchase of the property herein described by the said Caroline W. Dobbins and upon which the said gas works are being erected for said Caroline W. Dobbins as aforesaid, there was in operation a soap factory; that at all times since the 1st day of August, 1901, there has been and is now maintained within the district bounded by Redondo and Alhambra streets, the Los Angeles river and San Fernando street, in said City of Los Angeles,

one wool-pulling factory, which is directly across North Main street from the said premises of the said Caroline W. Dobbins, three wineries, numerous oil wells in operation, an extensive iron foundry in active operation, a brass foundry, and an extensive oil refinery; and that there is a great deal of vacant and unoccupied land which is and will continue to be comparatively worthless except for the purposes of the erection thereon of manufacturing establishments; that immediately adjacent to the easterly line of said district last herein described are the tracks of the Southern California Railway, on which are operated the freight and passenger trains of the Santa Fe railroad; that east of that and adjacent thereto is the Los Angeles river, and that east thereof is the right-of-way and tracks of the San Pedro, Los Angeles and Salt Lake railroad; that immediately east of those tracks an extensive tannery is located and in operation; that immediately north of said district and north of San Fernando street, and adjacent to the tracks of the Santa Fe railroad are the oil tanks and refinery of the Standard Oil Company in extensive operation; that prior to the granting of the permit by the Board of Fire Commissioners of the City of Los Angeles to the said Caroline W. Dobbins on the 22nd day of November, 1901, the said Board of Fire Commissioners and the members of the said commission individually and jointly visited and examined the said premises and the said district surrounding the same, and having heard the protests of all persons who ap-

peared before them, decided and determined by the granting of said permit that said premises were in all respects a suitable place upon which to erect the said gas works and to conduct the business of manufacturing gas.

It is alleged that said gas works are being constructed and are to be completed upon concrete foundations, with a superstructure of brick, steel and iron, of the best material procurable, and are not combustible, and that the same are so firmly and substantially constructed that there can be no danger from explosions, bursting or leakage; that all the machinery now in place therein or to be placed therein is of the most approved pattern, and constructed in accordance with the latest devices and improvements known in the manufacture of gas; that said works can and will be operated and maintained by the said Caroline W. Dobbins by the use of the said devices and improvements and the said machinery therein contained, so that there will be no leakage or escape of odors, and that the same will not create a nuisance and will not interfere in any way with the health, comfort, safety or welfare of the inhabitants of the said district and territory in which the said gas works are located upon the premises of the said Caroline W. Dobbins as hereinbefore described or of any other of the inhabitants of the said City of Los Angeles.

In its original bill of complaint, complainant avers that if the City of Los Angeles should be allowed to arrest and continue to arrest the employes of the

complainant so engaged in the building of said water tank and gas holder and in carrying out its contract with the Valley Gas & Fuel Company and if the City of Los Angeles was allowed to carry its threats into execution, the complainant would suffer great and irreparable loss; that the work already performed by the complainant in carrying out said contract consisted of there being placed upon the premises of the said Caroline W. Dobbins hereinbefore described, a large quantity of steel plates ready to be put in place in said water tank and gas holder and of having partially erected on said premises the water tank hereinbefore set forth, all of which were exposed to the elements and in imminent danger of being utterly destroyed by the action of the elements and were of great value to the complainant, costing upwards of the sum of $8000; that complainant had been forced to employ in the construction of said water tank and gas holder skilled mechanics and had brought them from divers and sundry places at great distances from the City of Los Angeles as hereinbefore set forth, and that if the said city was allowed to execute its said threats of arresting said men, said men threatened to and would leave the employment of complainant and if said work should be retarded and interrupted by reason of said threats and interruption thereof by said City of Los Angeles, as it would if said threats were executed, the said skilled laborers and mechanics so employed by complainant would become scattered and complainant would not be able again to obtain their services, or the services of like men in such employment, all of which would cause

the complainant great and irreparable damages; that complainant would have no adequate remedy at law and would not be able to carry out the contract entered into between the complainant and the said Valley Gas & Fuel Company and that there would result innumerable actions at law and a multiplicity of suits, which would have to be instituted at great expense and all without any possibility of complainant recovering indemnity for said expenses; that complainant had already done work in carrying out said contract amounting to upwards of the sum of $9000 and had only received on account thereof the sum of $3000 and could not and would not be able to recover the sums of money already expended by it and the expenses incurred by it in attempting to carry out its lawful contract with the Valley Gas & Fuel Company as it would not on its part be able to fulfill and carry out the same according to the terms thereof; that the damages sustained by complainant in being unable to complete said contract as hereinbefore set forth would be upwards of $10,000.

Complainant averred that the City of Los Angeles combining and confederating with divers and sundry persons to complainant unknown has attempted to and has interfered with the rights of complainant and with the prosecution of the work undertaken by complainant as aforesaid, and the City of Los Angeles threatens and intends to proceed against complainant and its employes until complainant is compelled to desist from the completion of said contract, all of which acts and doings on the part of the City of Los Angeles were in

violation of the rights of complainant and contrary to equity and good conscience.

Complainant also filed by leave of court a supplemental bill alleging that since the filing of the original bill the City of Los Angeles again combining and confederating with James R. C. Burton and with divers and sundry persons to the complainant unknown, in the name of the people of the State of California instituted another proceeding in the Police Court of the City of Los Angeles against Thaddeus Lowe, F. A. Smith, Martin Daly and twenty-one other persons, the said Thaddeus Lowe and the said F. A. Smith being in the employ of the Valley Gas & Fuel Company and all of the other said persons being in the employ of the complainant in the erection of said gas works on the premises of said Caroline W. Dobbins in the carrying out the said contract between complainant and the said Valley Gas & Fuel Company, and of the contract between the Valley Gas & Fuel Company and the said Caroline W. Dobbins, charging the said Thaddeus Lowe, the said F. A. Smith and the said Martin Daly and the said twenty-one other persons with having committed a misdemeanor in that they did wilfully and unlawfully erect and cause to be erected, maintain and cause to be maintained, certain works, establishments and manufactory for the manufacture of gas, and a certain water tank and reservoir and receptacle for the storage of gas within the corporate limits of the city of Los Angeles outside of the limits of that district as described in the purported ordinance attempted to be passed by the said council of the city

of Los Angeles on the 3rd day of March, 1902, as last hereinbefore set forth, and that thereupon, upon the complaint filed in said proceeding in said police court that said city of Los Angeles did cause the arrest and detention of the said Thaddeus Lowe, F. A. Smith and Martin Daly and the twenty-one other persons above referred to, upon a warrant issued by the Judge of the said Police Court of the city of Los Angeles for the alleged violation of the said city ordinance; and complainant alleged that by the arrest and detention of said employes of the complainant as last hereinbefore set forth, complainant was compelled to desist and refrain from further work on its said contract of erecting said water tank under its said contract for erecting said water tank and gas holder described in said complaint and that said arrest of said men and employes was in violation of the rights of complainant as in said original bill of complaint set forth.

The prayer of the complaint was for a temporary injunction restraining the defendant, the City of Los Angeles, from enforcing the alleged ordinance number 6779, adopted on the 25th day of November, 1901, or enforcing the alleged ordinance number 7029 adopted on the 3rd day of March, 1902, against the complainant or any of its agents or employes, and from preventing the complainant from carrying out and prosecuting the said work of erecting the said water tank and gas holder upon the premises described in said complaint, and that upon the final hearing of said cause that the said defendant may be perpetually enjoined from further continuing in any of the acts last

hereinbefore specifically set forth; and for general relief.

To this complaint, on the 10th day of March, 1902, the defendant the City of Los Angeles filed a demurrer and for cause of demurrer alleged that by said bill of complaint it appeared that complainant was not entitled to the relief prayed for by the bill against the defendant; that by said bill of complaint it appeared that said plaintiff was not entitled to any relief against the said defendant and that it appeared by said bill that said Circuit Court had no jurisdiction of the subject matter or of the person of the said defendant; or no jurisdiction of the subject matter of said suit.

A motion was made for a temporary injunction and on the hearing of this motion and of the demurrer the court determined that the jurisdiction of the court did not exist and for that reason the temporary injunction applied for was refused and the demurrer was sustained and the bill dismissed for want of equity. From the order and decree entered in said cause sustaining the demurrer and dismissing the bill for want of equity and for costs the complainant appealed to this court.

It is averred in the complaint that the ordinances as attempted to be adopted by the city council of the city of Los Angeles on the 25th day of November, 1901, and on the 3rd day of March, 1902, were void and invalid in that they were uncertain and unreasonable and were an attempt to regulate in an unlawful manner and without authority, the business of erecting gas works within the city of Los Angeles;

That they were in violation of the rights of complainant secured to it by virtue of its contract entered into between it and the Valley Gas & Fuel Company and were in violation of the rights secured to the said Caroline W. Dobbins by the City of Los Angeles on the 22nd day of November, 1901;

And were in violation of the provisions of the Constitution of the United States prohibiting the passing of any laws impairing the obligation of contracts.

The ordinances of November 25th, 1901, and of March 3rd, 1902, are void and invalid and are in violation of the provisions of the constitution of the State of California, and also the provisions of the Fourteenth Amendment of the constitution of the United States, in that it is an attempt on the part of the City of Los Angeles to make and enforce laws which abridge the privileges and immunities of the citizens of the United States, in that it is an attempt to prohibit the erection or maintenance of any works, establishment or manufactory for the manufacture of gas or the storage of gas within the corporate limits of the city of Los Angeles, except within the limits described in said ordinance, for that said business of erecting and maintaining gas works is not a nuisance, but is a lawful occupation and protected by the provisions of Article Eleven, section 19, of the constitution of the State of California.

Said ordinances are void and invalid and in violation of the provisions of the Fourteenth Amendment of the constitution of the United States as intended to deprive the said plaintiff of its property without due process of law.

Said ordinances are in violation of the Fourteenth Amendment of the constitution of the United States as denying to all persons within the jurisdiction of the city of Los Angeles the equal protection of the laws and as being passed in an attempt on the part of the City of Los Angeles to foster a monopoly and to protect the Los Angeles Lighting Company in the enjoyment of a monopoly in the business of manufacturing and distributing gas in the city of Los Angeles and for the purpose of discriminating against the said complainant and to prevent it from erecting other gas works within the limits of the city of Los Angeles.

SPECIFICATIONS OF ERROR.

I.

The court below erred in denying the motion made by the appellant for a preliminary injunction.

II.

The court below erred in holding that a court of equity was without jurisdiction to enjoin criminal prosecutions under a statute or ordinance alleged to be unconstitutional, even though it was alleged that it is the purpose of such prosecutions to injure complainant in its property rights and that such would be their effect.

III.

The court erred in not determining that the ordinances of the city of Los Angeles adopted November 25th, 1901, and March 3rd, 1902, were void and in-

valid and in violation of the provisions of the constitution of the United States as against the said complainant.

IV.

The court erred in sustaining the demurrer filed by the defendant to the complainant's bill.

V.

The court erred in dismissing the complainant's bill for want of equity.

BRIEF.

The foundation of this action lies in the invalidity of the ordinances of November 25th, 1901, and of March 3rd, 1902, adopted by the City Council of the City of Los Angeles, alleged in the bill of complaint to be in contravention of the provisions of the constitution of the United States. An appeal, therefore, lies directly from the Circuit Court to this Court, and this Court having jurisdiction of this case for the purpose of determining whether such ordinances are in contravention of the Constitution of the United States, there exists the power in this Court to consider all other questions arising on the record.

Act of March 3rd, 1891, Chapter 517, Section 5; 26 Statutes at Large, 826.

Horner v. United States, 143 U. S. 570.

Chappell v. United States, 160 U. S. 499.

Loeb v. Columbia Bank Trustees, 179 U. S. 472, 478.

Penn Mutual Life Insurance Company v. Austin, 168 U. S. 685, 695.

II.

The ordinances in question of the City of Los Angeles were but the exercise by the city of the legislative powers delegated to it by the State, and were, therefore by legal intendment the equivalent of laws enacted by the State itself.

Penn Mutual Life Insurance Company v. Austin, supra, p. 694.

City Railway Company v. Citizens' Street Railroad Company, 166 U. S. 557, 563.

St. Paul Gaslight Company v. St. Paul, 181 U. S. 142, 148.

III.

The ordinance number 6779 of November 25th, 1901, was repealed by the ordinance number 7029 of March 3rd, 1902. The ordinances are on the same subject matter. The latter ordinance covers the whole subject matter of the earlier and will repeal the former.

23 *American and English Encyclopedia of Law*, 485.

IV.

The ordinance of March 3rd, 1902, is invalid for the reason that it is in violation of the Constitution of the United States in that it impairs the obligation of the contract between appellant and the Valley Gas

& Fuel Company to erect and construct the water tank and gas holder upon the premises of Caroline W. Dobbins.

Farrington v. Tennessee, 95 U. S. 679.

Sturgess v. Crowninshield, 4 Wheat. 122.

City Railroad Company v. Citizens' Street Railroad Co., supra.

Detroit v. Detroit Citizens Street Railroad Co., 184 U. S. 368.

V.

The ordinance of March 3rd, 1902, is invalid for the reason that it is in violation of the vested rights acquired by Caroline W. Dobbins, the employer of the appellant by virtue of the purchase by her of lands within the limits of the district within which it was lawful to erect gas works, by the terms of the ordinance adopted August 26th, 1901, and by virtue of the permit granted to her by the Board of Fire Commissioners of the City of Los Angeles on the 22nd day of November, 1901, under the existing "Building and Fire Ordinance" of the City of Los Angeles.

(a) The rights acquired by Caroline W. Dobbins, the employer of the appellant, were vested rights.

Section 101 of the Building ordinance of the City of Los Angeles is as follows: "It shall be unlawful for any person, firm or corporation to erect or cause to be erected, maintain or cause to be maintained, occupy or cause to be occupied, any * * * * gas works or other factory where power other than

animal power is used, within the corporate limits of said city, without a permit from the Board of Fire Commissioners so to do. Before any such permit shall be granted, the Clerk of the Board of Fire Commissioners shall mail a notice to each record owner of real property in the block in which it is intended to erect the building or structure for which a permit is sought, by depositing in the United States postoffice a postal card directed to each such record owner of property at his last known address, notifying said record owner of the fact that such permit is applied for, the nature of the same, and the time and place when and where the application for the granting of the same will be heard. Said Board shall at such hearing give an opportunity to all parties interested to be heard, and shall have power to grant or refuse such permit. The costs of mailing said notice to be first deposited, by said applicant, with the Clerk of said Board."

Calder v. Bull, 3 Dall, 394.

Farrington v. Tennessee, 95 U. S. 679.

Steamship Co. v. Jolliff, 2 Wall. 457.

Worth v. Cransen, 48 U. S. 118.

Classen v. Chesapeake Guano Co. (Md.), 31 Atla. Rep. 808.

Roberts v. Brooks, 71 Fed. Rep. 914.

Baltimore Trust Co. v. Baltimore, 64 Fed. Rep. 153.

Lewis v. City of Newton, 75 Fed. Rep. 884.

Cleveland City Railroad Co. v. City of Cleveland, 94 Fed. Rep. 385.

City Railway Company v. Citizens' Street Railway Co., 166 U. S. 562.

(b) The appellant, as the contractor, doing the work for Caroline W. Dobbins under her permit granted to her by the Board of Fire Commissioners, was entitled to the benefit and protection of the vested rights which she had acquired by virtue of legislative authority.

Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, 393.

VI.

The ordinance of March 3rd, 1902, adopted by the city council of the City of Los Angeles is invalid and void as depriving the appellant of property without due process of law.

City of Chicago v. Netcher, 183 Ill. 104; 55 N. E. Rep. 707.

Frorer v. People, 141 Ill. 171, 31 N. E. 395.

Ramsey v. People, 142 Ill. 380, 32 N. E. 364.

Braceville Coal Co. v. People, 147 Ill. 66, 35 N. E. 62.

Cooley Const. Lim. * 393.

VII.

Police Power.

The ordinance of March 3rd, 1902, is not within the police power, nor is it a proper police regulation.

(a) The determination by the legislative body of what is a proper exercise of the police power is not final or conclusive, but is subject to the supervision of the courts.

People v. Budd, 117 N. Y. 1.

Lawton v. Steele, 152 U. S. 133.

Brandon on the Fourteenth Amendment, p. 172.

(b) The police power has reference to those things which affect the public health, the public safety, the public comfort, or the public morals.

Noel v. People, 187 Ill. 587; 58 N. E. 616.

City of Chicago v. Netcher, supra.

State v. Donaldson, 41 Minn. 74, 42 N. W. 781.

City of Indianapolis v. Consumers' Gas Trust Company, 39 N. E. Rep. (Ind.) 433.

Barthet v. City of New Orleans, 24 Fed. Rep. 564.

City of Buffalo v. Chadeayne (N. Y.) 31 N. E. Rep. 443.

New Orleans Gas Company v. Louisiana Light Company, 115 U. S. 650.

Walla Walla City v. Walla Walla Water Company, 172 U. S. 115.

Distinguished:

Beer Company v. Massachusetts, 97 U. S. 25;

Fertilizing Company v. Hyde Park, 97 U. S. 659.

Stone v. Mississippi, 101 U. S. 814.

Slaughter House cases, 16 Wall. 36.

Butchers' Union Co. v. Crescent City Live-Stock Landing Co., 111 U. S. 746.

Ex parte Lacey, 108 Cal. 326.

Barbier v. Connolly, 113 U. S. 27.

Knoxville v. Bird, 12 Lea. 121.

Davenport v. City of Richmond, 81 Va. 636.

VIII.

1. This ordinance is invalid because it is an attempt on the part of the city council of the City of Los

Angeles to define and make that a nuisance which is not a nuisance *per se*.

(a) Gas works are neither in their erection nor maintenance a nuisance *per se* and it is not within the power of the city council of the city of Los Angeles to pass an ordinance making that a nuisance which is not a nuisance *per se*, nor could such a declaration make it a nuisance unless it in fact had that character.

New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 560.

Yates v. Milwaukee, 10 Wall. 497.

C. R. I. & P. R. R. v. Joliet, 79 Ill. 25, 44.

C. R. I. & P. R. R. v. Joliet, 79 Ill.

Everett v. Council Bluffs, 46 Iowa, 66.

Ex parte Sing Lee, 96 Cal. 354.

County of Los Angeles v. The Hollywood Cemetery Association, 124 Cal. 344.

Grossman v. Oakland (Oregon), 36 L. R. A. 593.

Stockton Laundry Case, 31 Fed. 680.

In re Hong Wah, 82 Fed. Rep. 623, 624, 626.

Ex parte Whitall, 98 Cal. 73.

Wood on Nuisances, Sec. 744.

(b) The power granted in the City Charter to *abate* nuisances does not give power to *prevent* except in those cases of nuisances *per se*; and those things which only become nuisances because of the method of their operation cannot be prevented and stopped under the power to abate until it has been demonstrated they are nuisances.

Lakeview v. Letz, 44 Ill. 81, 83.

The Charter of the City of Los Angeles is a general law of the State of California. The provisions

thereof showing the powers of the City of Los Angeles in reference to the abatement or prevention of nuisances are as follows:

"Article I. Sec. 13. To license and regulate the carrying on of any and all professions, trades, callings, and occupations carried on within the limits of said city, and to fix the amount of license tax thereon to be paid by all persons engaged in such professions, trades, callings, or occupations, and provide the manner of enforcing the payment of the same; *provided*, that no discrimination shall be made between persons engaged in the same business otherwise than by proportioning the tax upon any business to the amount of business done; and to license, regulate, restrain, suppress, or prohibit any or all laundries, livery and sale stables, cattle and horse corrals, slaughter houses, butcher shops, hawkers, peddlers, pawnbrokers, dance cellars, melodeons, shows, circuses, public billiard tables, bowling and tenpin alleys, and to suppress and prohibit all faro banks, games of chance, gambling houses, tables, or stands, bawdy houses, the keeping of bees within the city limits, and any and all obnoxious, offensive, immoral, indecent, or disreputable places of business, or practice.

Sec. 17. To provide and maintain a proper and efficient fire department, and make and adopt such measures, rules and regulations for the prevention and extinguishment of fires, and for the preservation of property endangered thereby, as may be deemed expedient.

Sec. 22. To make and enforce within its limits such other local, police, sanitary, and other regulations as are not in conflict with general laws, and are deemed expedient to maintain the public peace, protect property, promote the public morals, and to preserve the health of its inhabitants.

Article III. Sec. 25. It may, by ordinance, declare what constitutes a nuisance, and provide for the abatement and removal thereof.

Sec. 27. It shall, by ordinance, regulate, and may prohibit, the keeping of gunpowder, acids, or other explosive, combustible, or inflammable material, within the limits of the city, or any specified part thereof.

Sec. 30. It shall, by ordinance, establish fire districts, and determine the character of buildings that may be erected therein, and the nature of the materials to be used in the construction, alteration, or repair of such buildings, or in the repair or alteration of existing buildings within such limits."

Charter of the City of Los Angeles, Statutes of California 1889, p. 455.

There is no reservation of power in the Charter.

(c) The provision of Section Eleven, Article XI, of the Constitution of the State of California, as follows: "That any county, city or township may make and enforce within its jurisdiction all such local police, sanitary and other regulations as are not in conflict with general laws," is not a grant of police power. It is simply an extension to counties, cities and towns of the right to exercise powers that

are inherent in the legislature as the representative of the poeple; but it is in no sense an enlargement of that power.

Ex parte Campbell, 74 Cal. 20.

Ex parte Roach, 104 Cal. 272.

IX.

The ordinance adopted by the city council of the city of Los Angeles on March 3rd, 1902, is invalid and is not binding upon the plaintiff and is in violation of the provisions of the Constitution of the United States prohibiting any State from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States.

1. It is invalid as being in violation of the rights of the plaintiff to engage and conduct a lawful business of erecting gas works in the city of Los Angeles.

Brandon on the Fourteenth Amendment, p. 65.

Corfield v. Coryell, 4 Wash. C. C., 371; Fed. Cases No. 3230.

(a) The business of erecting or maintaining a gas works is a lawful occupation.

New Orleans Gas Company v. Louisiana Light Co., 115 U. S. 650, 658, 669.

Constitution of the State of California, Article XI, Sec. 19.

Ex Parte Johnston, —— *Cal.* —; 69 Pac. Rep., 973, 975.

People v. Stevens, 62 Cal. 209.

(b) A municipality has not the power or right to impose additional burdens or terms or conditions to the exercise of rights created by the sovereign authority of the State in its Constitution. Restrictions in the exercise of these rights are not regulations and at least impair if they do not deny the exercise of the right.

Ex parte Johnston, supra.

Township of Summit v. N. Y. & N. J. Tel. Co., 57 N. J., Eq. 123.

City of Atlanta v. Gate City Gaslight Co., 71 Ga. 106.

Michigan Telephone Company v. City of Benton Harbor, 121 Mich. 512.

Wisconsin Telephone Company v. City of Oshkosh, 62 Wis. 32.

Appeal of Pittsburg, 115 Pa. 4.

Borrough of Millvale v, Evergreen Railway Co., 131 Pa. 1.

Harrisburg City Pass. R. R. Co. v. City of Harrisburg, 149 Pa. 465.

State v. Flad, 23 Mo. App. 185.

Hodges v. Telegraph Co., 72 Miss. 910.

2. The ordinance is invalid as being unreasonable.

X.

A court of equity has power to restrain by injunction a municipality from instituting criminal proceedings when such criminal prosecutions are threatened under color of an invalid ordinance for the purpose of compelling the relinquishment of a property right.

Central Trust Company v. Citizens' St. R. Co., 80 Fed. Rep. 225; s. c. 82 Fed. 1.

Reagan v. Trust Co., 154 U. S. 362.

Southern Express Co., Mayor, etc., of Ensley, 116 Fed. 756.

Lottery Co. v. Fitzpatrick, 3 Woods, 222, Fed. Cases No. 8,541.

Springhead Spinning Company v. Riley, L. R. 6 Eq. 588.

Osborn v. United States Bank, 3 Wheat. 738.

Wood v. City of Brooklyn, 14 Barb. 425.

Manhattan Iron Works v. French, 12 Abbott's N. C. 446.

Rushville v. Rushville Natural Gas Co., 132 Ind. 575; 15 L. R. A. 321.

Davis v. Fasig, 128 Ind. 271, 27 N. E. Rep. 726.

Platte & D. Canal & Milling Co. v. Lee, Mayor, (Colo.) 29 Pac. Rep. 1036.

Smith v. Bangs, 15 Ill. 399.

Mayor of Baltimore v. Radecke, 49 Md. 218.

Cape May & L. R. Co. v. City of Cape May, 35 N. J. Eq. 409.

Los Angeles City Water Co. v. City of Los Angeles, 103 Fed. Rep. 711.

City of Atlanta v. Gate City Gaslight Co., 71 Ga. 196.

City of Austin v. Austin City Cemetery Association (Tex.) 28 S. W. 528.

Port Mobile v. Louisville & N. Railway Co., 4 Sou. Rep. 106 (Ala.).

Smyth v. Ames, 169 U. S. 466, 517.

Detroit v. Detroit Citizens' St. Railway Co., 184 U. S. 368, 378.

Vicksburg Water Works v. Vicksburg, 185 U. S. 65, 82.

Contra: Opinion of Honorable Olin Wellborn, District Judge, in the case at bar, appearing in the record, reported:

Davis & Farnum Manufacturing Co. v. City of Los Angeles, 115 Fed. Rep. 537.

Distinguished:

Ex parte Sawyer, 124 U. S. 200.

Suess v. Noble, 31 Fed. 855;

M. Schandler Bottling Co. v. Welch, 45 Fed. 283;

Minneapolis Brewing Co. v. McGillivray, 104 Fed. 272.

XI.

The plaintiff has no remedy against the defendant for damages for the wrongful arrest of its employes or for the destruction of its business and property rights.

Stedman v. San Francisco, 63 Cal. 193.

Chope v. Eureka, 78 Cal. 508.

Doeg v. Cook, 126 Cal. 213.

XII.

It is not enough that the plaintiff has a remedy at law. It must be as efficient and as prompt in its administration as the remedy in equity.

Boyce v. Grundy, 3 Peters 377.

Walla Walla City v. Walla Walla Water Co., 172 U. S. 1, 12.

Insurance Co. v. Bailey, 13 Wall. 616, 621.

Kilbourn v. Sunderland, 130 U. S. 505, 514.

Tyler v. Savage, 143 U. S. 79, 95.

2 Story Eq. Sec. 928.

ARGUMENT.

Preliminary to a presentation of the main issues of this case and a discussion of the questions raised thereby, it is to be noticed that, the foundations of this action lying in the invalidity of the ordinances of November 25th, 1901, and of March 3rd, 1902, adopted by the City Council of the City of Los Angeles, alleged in the bill of complaint to be in contravention of the provisions of the Constitution of the United States, an appeal lies directly from the Circuit Court to this Court.

As was said in the case of *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 478:

"It was the purpose of Congress to give opportunity to an unsuccessful litigant to come to this court directly from the Circuit Court in every case in which a claim is made that a State law is in contravention of the Constitution of the United States."

The jurisdiction of this court on such appeal does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the court below. *Ibid* 481.

And this Court having jurisdiction of this case for the purpose of determining whether such ordinances are in contravention of the Constitution of the United States, there exists the power in this Court to consider all other questions arising on the record. *Ibid* 481.

Penn Mutual Life Insurance Co. v. Austin, 168 U. S. 685, 695.

Horner v. United States, 143 U. S. 570, 576.
Chappell v. United States, 160 U. S. 499.

The allegations of the complaint fully disclose the nullity of these city ordinances and in what respect they are in violation of the Constitution of the United States. These ordinances were, as has been said by this court in another case, "but the exercise by a city of a legislative power which it assumed has been delegated to it by the State, and were, therefore, in legal intendment, the equivalent of laws enacted by the State itself."

Penn Mutual Life Insurance Company v. Austin, supra, 694.
City Railway Company v. Citizens Street Railroad Co., 166 U. S. 557.
St. Paul Gaslight Company v. St. Paul, 181 U. S. 142, 148.

It is not necessary for this Court to consider specifically the ordinance number 6779, attempted to be adopted by the City Council of the City of Los Angeles, November 25th, 1901, as an amendment to section one of the ordinance of August 26th, 1901, for the reason that an examination of that ordinance disclosed that the designated boundaries therein mentioned did not describe a district. The boundaries are not tied together, and the gap in the description of the district of over one thousand feet of itself rendered the ordinance invalid for indefiniteness. Recognizing this fact, the City Council of the City of Los Angeles adopted the ordinance number 7029 of March 3rd, 1902, the ef-

fect of which was to repeal the ordinance of November 25th, 1901, attempting to cover the same subject matter.

The ordinances are on the same subject matter. The latter covers the whole subject matter of the earlier ordinance, and while not purporting to amend, it plainly shows that it was intended as a substitute for the earlier act. "Such an ordinance will repeal the former ordinance covering the same subject."

23 Am. & Eng. Encyclopedia of Law, 485.

I.

THE ORDINANCE OF MARCH 3RD, 1902, IS INVALID FOR THE REASON THAT IT IS IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES IN THAT IT IMPAIRS THE OBLIGATION OF THE CONTRACT BETWEEN THE APPELLANT AND THE VALLEY GAS & FUEL COMPANY TO ERECT AND CONSTRUCT THE WATER TANK AND GAS HOLDER UPON THE PREMISES OF CAROLINE W. DOBBINS.

About September 1st, 1901, the Valley Gas & Fuel Company entered into a contract to build, construct and erect for Caroline W. Dobbins, on certain premises to be designated by her in the City of Los Angeles, certain gas works. In order to enable the Valley Gas & Fuel Company to carry out its contract with Caroline W. Dobbins appellant on or about the 17th day of September, 1901, at Waltham, in the

State of Massachusetts, entered into a contract with the Valley Gas & Fuel Company to erect on the premises in the city of Los Angeles to be designated by Caroline W. Dobbins, certain portions of said gas works, consisting of water tank and gas holder, in consideration of the payment to appellant by the Valley Gas & Fuel Company of the sum of $13,685 when its work was completed. On the 28th day of September following, Mrs. Dobbins purchased in the City of Los Angeles in the district in which it was then lawful by the ordinance adopted August 26th, 1901, to erect gas works, certain premises and subsequently, on the 22nd day of November, 1901, secured from the Board of Fire Commissioners of the City of Los Angeles, a permit to erect gas works upon said premises. By the Charter of the City of Los Angeles and the ordinances then in force, the Board of Fire Commissioners had power to grant such a permit.

Immediately upon the granting of the permit Mrs. Dobbins gave directions that the gas works for which she had obtained a permit, should be erected upon the premises she had previously purchased for that purpose, and pursuant to the contract between the appellant and the Valley Gas & Fuel Company, directed the appellant to commence the erection of the water tank and gas holder upon the said premises, pursuant to its contract with the Valley Gas & Fuel Company. These gas works were in process of construction at the time of the passage of the ordinance of March 3rd, 1902, and by the enforcement of that

ordinance, appellant was compelled to desist and refrain from further work upon that contract. The City of Los Angeles also threatened that if appellant attempted to carry on the work in which it was engaged that it would arrest all persons employed by appellant until it should have stopped the business of appellant and the performance of its contract with the Valley Gas & Fuel Company.

This act of the City of Los Angeles in the passage and enforcement of this ordinance was an impairment of the obligations of the contract between the appellant and the Valley Gas & Fuel Company and was in violation of the provisions of the Constitution of the United States prohibiting the passage of any law impairing the obligation of a contract.

It is true that the water tank and gas holder had not been completed at the time of the filing of this complaint, nor had the gas works been completely erected for Caroline W. Dobbins under the permit granted by the Board of Fire Commissioners, and it was necessary to continue the work on the water tank and gas holder for three to four weeks longer in order to complete them, but there is no difference in law between executory and executed contracts so far as the power of the city or State to pass any law impairing their obligations is concerned.

The appellant had bound itself to erect upon the premises designated, the water tank and gas holder. It was the right of Caroline W. Dobbins to have the gas works completed and the appellant was under obligation, by the terms of its contract, to erect

and construct the water tank and gas holder according to the terms of the contract and that obligation was one which could be enforced. Were it not for the action of the city authorities of the City of Los Angeles, the performance of the contract was only a question of a short time.

In the case of *Farrington v. Tennessee*, 95 U. S. 679, Mr. Justice Swayne, delivering the opinion of this court, said:

"A compact lies at the foundation of all national life. Contracts mark the progress of communities in civilization and prosperity. They guard, as far as is possible, against the fluctuations of human affairs. They seek to give stability to the present and certainty to the future. They gauge the confidence of man in the truthfulness and integrity of his fellowmen. They are the springs of business, trade, and commerce. * * * *

"The Constitution of the United States wisely protects this interest, public and private, from invasion by State laws. It declares that 'no State shall * * * pass any * * * laws impairing the obligation of contracts.' Art. 1, Sec. 10. This limitation no member of the Union can overpass. It is one of the most important functions of this tribunal to apply and enforce it upon all proper occasions. * * *

"Contracts are executed or executory. A contract is executed where everything that was to be done is done, and nothing remains to be done. A grant actually made is within this category. Such a contract requires no consideration to support it. A gift consummated is as valid in law as anything else. *Dartmouth College v. Woodward*, 4 Wheat. 518. An executory contract is one where it is stipulated by the agreement of minds, upon a sufficient consideration, that something is to be done or not to be done by one or both the parties. Only a slight consideration is necessary. *Pillans v. Van Mierop*, 3 Burr. 1663; *Fourth v. Stanton*, 1 Saund. 210, note 2, and the cases there cited.

"The constitutional prohibition applies alike to both executory and executed contracts, by whomsoever made. The amount of the impairment of the obligation is immaterial. If there be any, it is sufficient to bring into activity the constitutional provision and the judicial power of this court to redress the wrong. Von Hoffman v. City of Quincy, 4 *Wall.* 535.

"The doctrine of the sacredness of vested rights has its root deep in the common law of England, whence so much of our own has been transplanted. Kent, then chief justice, said: It is a principle of that law, 'as old as the law itself, that a statute even of its omnipotent Parliament is not to have a retrospective effect. *Nova constitutio futuris forman imponere debet et non preteritis.* Bracton, lib. 228; 2 Inst. 292.' *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 477. See also *Society &c. v. Wheeler et al.*, 2. Gall. 105, and Broom's Legal Maxims, 34."

The appellant having entered into this contract with a view to the existing ordinances then in force of the City of Los Angeles, and, after the permit had been granted by the Board of Fire Commissioners to appellant's employer, Caroline W. Dobbins, having entered upon the work of the performance of the contract, and expended a large sum of money in attempting to carry out its provisions, the subsequent passage by the city council of the City of Los Angeles of the ordinance of March 3rd, 1902, making it unlawful to erect gas works upon the premises owned by the said Caroline W. Dobbins, and upon which appellant was erecting the gas works, was an impairment of the obligation of the contract between appellant and the Valley Gas & Fuel Company and Caroline W. Dobbins.

In the case of *Sturgess v. Crowninshield*, 4 Wheat. 122, 197, this court said:

"A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day: and this is its obligation. Any law which releases a part of this obligation, must, in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid, and entirely discharges it."

How much more must a law impair the obligation of a contract which makes it absolutely impossible to perform,—in fact prohibits the performance of the terms of the contract?

After having adopted the ordinance of August 26th, 1901, fixing the limits in which it was lawful, at least by implication to erect gas works, and after having granted to Caroline W. Dobbins the permit to erect gas works, and after the appellant had in the faith of such ordinances entered into a contract to erect the water tank and gas holder upon the premises of Caroline W. Dobbins, and after the granting of the permit by the Board of Fire Commissioners of the City of Los Angeles to erect those gas works, had entered upon the work of constructing the water tank and gas holder necessary therefor, the action of the City of Los Angeles in passing and attempting to enforce the ordinance of March 3rd, 1902, restricting the limits of the district in which by implication it was lawful to erect gas works, was an arbitrary action of the city council and the authorities of the City of Los Angeles and made it impossible

for the appellant to fulfill the terms of its contract.

Whatever may be the rights of the City of Los Angeles to establish a district in which it is lawful or unlawful to erect gas works, such legislation must be exercised in subordination to the principle which secures the inviolability of contracts. But the ordinance in question comes within the prohibition of the Federal Constitution and as against the appellant in this case the ordinance is invalid.

II.

THE ORDINANCE OF MARCH 3RD, 1902, IS INVALID FOR THE REASON THAT IT IS IN VIOLATION OF THE VESTED RIGHTS ACQUIRED BY CAROLINE W. DOBBINS, THE EMPLOYER OF THE APPELLANT, BY VIRTUE OF THE PURCHASE BY HER OF LANDS WITHIN THE LIMITS OF THE DISTRICT WITHIN WHICH IT WAS LAWFUL TO ERECT GAS WORKS BY THE TERMS OF THE ORDINANCE ADOPTED AUGUST 26TH, 1901, AND BY VIRTUE OF THE PERMIT GRANTED TO HER BY THE BOARD OF FIRE COMMISSIONERS OF THE CITY OF LOS ANGELES ON THE 22ND DAY OF NOVEMBER, 1901, UNDER THE EXISTING BUILDING AND FIRE ORDINANCE OF THE CITY OF LOS ANGELES.

(a) The rights acquired by Caroline W. Dobbins, the employer of the appellant, were vested rights.

On the 26th day of August, 1901, the city council of the City of Los Angeles adopted an ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs outside of the limits of a certain district described in the ordinance, and by implication it was lawful to erect gas works within the district described. With this ordinance in force on the 28th day of September, 1901, Caroline W. Dobbins purchased certain premises within that district. At that time there was also in force in the City of Los Angeles an ordinance regulating the manner of constructing, altering, etc., buildings in the City of Los Angeles, and known as the "Building Ordinance," by which it was provided that it should be unlawful for any person to erect a gas works within the City of Los Angeles without a permit from the Board of Fire Commissioners so to do. The Board of Fire Commissioners had power to grant or refuse such permit. Complying with that ordinance, on the first day of November, 1901, Caroline W. Dobbins made application to the Fire Commissioners for permit to erect gas works on the premises which she had purchased within the district within which it was then lawful to erect gas works, which permit, after a hearing in compliance with the ordinance, was on the 22nd day of November, 1901, granted to the said Caroline W. Dobbins. Immediately thereafter she, through her contractors, including appellant, commenced the work of the erection of the gas works upon the premises purchased by her and for which she had obtained the permit from the Board of Fire Commissioners of the City of Los Angeles. Caro-

line W. Dobbins, and her contractors, including the appellant, were vigorously engaged in the erection of said gas works, when the City of Los Angeles attempted to prohibit the further erection thereof by the adoption and enforcement of the ordinance of March 3rd, 1902.

There has never been any dispute or contradiction between counsel for appellant and counsel for appellee, as to the fact that Caroline W. Dobbins acquired vested rights by virtue of her purchase under legislative authority on the 28th day of September, 1901, of the land within the district described in the ordinance of August 26th, 1901, in which by implication it was lawful to erect gas works; by the permit which was granted to her by the Board of Fire Commissioners on the 22nd day of November, 1901; by the acceptance by her of that permit, and the expenditure by her thereunder of large sums of money prior to the passage of the ordinance of March 3rd, 1902.

All the acts of Caroline W. Dobbins in this matter were with a view of abiding by and conforming to the terms of all valid ordinances existing in the City of Los Angeles prior to the 3rd day of March, 1902. It is true that the gas works were not completed at the time of the passage of this ordinance, but they were in process of erection, and as we have heretofore said, there is no difference in law between executory and executed contracts, so far as the power of the city to pass any law which deprives Caroline W. Dobbins of her vested rights. The rights acquired

by Caroline W. Dobbins were vested rights and having been by her lawfully obtained, accepted and acted under, were as inviolable as any rights of property whatever.

It is well understood what is meant by a vested right in property. The grant of the permit to erect gas works, by the Board of Fire Commissioners, having authority for that purpose, conferred rights and privileges upon Caroline W. Dobbins, upon the faith of which it was accepted. The permit was granted at her request for the purpose of enabling her to erect gas works for the purpose of manufacturing, recovering and distributing gas to be supplied to the inhabitants of the City of Los Angeles. By the acceptance of it and the erection of the gas works for the purpose for which the permit was granted, she was engaged at once in the business of supplying a public utility and was under all the obligations involved in such an enterprise.

The acceptance of such undertaking with its correlative obligations imparted an obligation and duty upon the City of Los Angeles, having granted the permit to erect the gas works, which it was not at liberty to disregard, and there was by the grant an implied contract on the part of the City of Los Angeles that the rights and privileges so granted to her should be enjoyed. Mrs. Dobbins thus acquired vested property rights.

In defining what is a vested right, Mr. Justice Chase in the case of *Calder v. Bull*, 3 Dall. 394, has said:

"When I say that a right is vested in a citizen I mean that he has the power to do certain actions or possess certain things according to the law of the land."

As has been well said "everything which may pass under the form of an enactment is not to be considered the law of the land" and we contend that the ordinance of March 3rd, 1902, is not "the law of the land."

When rights are once acquired under legislative authority, claim may then be made to them as protection to property. The conditions of the law having been fulfilled with exactitude, and direct engagements made in reference thereto, the legislative power of interference therewith is limited. An obligation has been produced which cannot be violated and there can be no retrospective legislation that shall affect the vested rights thus acquired.

Farrington v. Tennessee, supra.

See also *Steamship Co. v. Jolliff*, 2 Wall. 457.

Wirth v. Branson, 98 U. S. 118.

Classen v. Chesapeake Guano Co., (Md.) 31 Atla. Rep. 808.

Roberts v. Brooks, 71 Fed. Rep. 914.

Baltimore Trust Co. v. Baltimore, 64 Fed. Rep. 153.

Levis v. City of Newton, 75 Fed. Rep. 884.

Cleveland City Railroad Co. v. City of Cleveland, 94 Fed. Rep. 385.

City Railway Company v. Citizens Street Railway Co., 166 U. S. 562.

Sufficient has been said in this case to show that Caroline W. Dobbins had vested rights in the premises at the time of the adoption and passage of the ordinance of March 3rd, 1902.

(b) The appellant as the contractor doing the work for Caroline W. Dobbins under her permit granted to her by the Board of Fire Commissioners was entitled to the benefit and protection of the vested rights which she had acquired by virtue of legislative authority.

It is wholly immaterial whether the appellant itself acquired vested rights or not so long as it was engaged in performing the work which it was necessary for Caroline W. Dobbins to perform in order to make her acceptance complete of the grant made to her by the City of Los Angeles.

The rights of Davis & Farnum Manufacturing Company were of course dependent upon the rights of Caroline W. Dobbins as secured to her by the permit granted to her by the Board of Fire Commissioners and as in her employ those rights inured to the benefit of the appellant. It was pecuniarily and beneficially and therefore equitably interested in the rights secured to Caroline W. Dobbins and was entitled to the protection thereof.

In the case of *Reagan v. Farmers Loan & Trust Company*, 154 U. S., 362, 393, the complaint was filed by the Farmers Loan & Trust Company, the Trustee in a trust deed executed by the railroad company to secure a bonded indebtedness, against the Railroad Commissioners of the State of Texas, to restrain them from enforcing certain rates which they had adopted and to restrain the Attorney General from instituting any suits against the railroad company, to recover penalties for its failure to con-

form to the rates and abide by the regulations of the Commission.

It was shown that one of the obligations assumed by the corporation railroad was to construct and operate its railroad between the termini named, and on the other hand one obligation assumed by the State was that it would not prevent the company from so constructing and operating the railroad.

This court, p. 393, said: "It is at least a question which arises as to the extent to which that contract goes, and one in which the corporation has a right to invoke the judgment of the courts; and if the corporation, a citizen of the State, has the right to maintain a suit for the determination of that question, clearly a citizen of another State, who has, under authority of the laws of the State of Texas, become pecuniarily interested in, equitably indeed the beneficial owner of, the property of the corporation, may invoke the judgment of the Federal courts as to whether the contract rights created by the charter, and of which it is thus the beneficial owner, are violated by subsequent acts of the State in limitation of the right to collect tolls."

In this case the Davis & Farnum Manufacturing Company had an equitable interest in the permit granted to Mrs. Dobbins to the extent that they were carrying out the contract of erecting the gas works and thereby were to derive the benefits of their work in so doing, and being the beneficiary of the permit, they are entitled to invoke the judgment of the court as to whether the vested rights created under the permit were violated by the subsequent ordinance of the City of Los Angeles.

III.

THE ORDINANCE OF MARCH 3RD, 1902, ADOPTED BY THE CITY COUNCIL OF THE CITY OF LOS ANGELES IS INVALID AND VOID AS DEPRIVING THE APPELLANT OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Caroline W. Dobbins did not acquire by the permit from the Board of Fire Commissioners an exclusive privilege to erect gas works in the City of Los Angeles, nor did she, by the purchase of the real property, acquired by her within the district within which by implication it was lawful under the ordinance of August 26th, 1901, to operate a gas works; but she having acquired that property, and having secured the permit from the Board of Fire Commissioners, and having entered into a contract with the appellant to erect the water tank and gas holder as part of said gas works on the premises purchased by her and the appellant having engaged in said work, foundered all the iron and steel therefor, and placed the same upon the ground and partially erected said water tank, appellant had a property right in such undertaking and a right to pursue its lawful business in erecting said gas works.

To prevent the appellant from finishing its said contract, to deprive it of the property which it already had therein, and of the benefits of the contract, and the right to the profit to be derived therefrom, without any hearing or without making any compensation therefor, was depriving it of its property

without due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States. For the City of Los Angeles to make it absolutely impossible to perform the contract, in fact to prohibit the performance of the contract; to deprive appellant of the right to carry on its business in which it was at the time of the passage of the ordinance lawfully engaged, was to take away from the plaintiff one of the incidents of its property, the right to use it, and the right to pursue an honest business, which business itself was at the time of the passage of the ordinance lawful—and so recognized as lawful by the laws of the State of California—and was depriving appellant of property rights protected by the provisions of the Federal Constitution.

To impose proper restrictions or regulations upon property in a proper exercise of the police power is one thing; but to absolutely prevent the use of property for the purpose for which the appellant had purchased it and to prevent the appellant from carrying on its lawful business in connection therewith, was to deprive appellant of its property without due process of law.

The case of the *City of Chicago v. Netcher,* 183 Ill. 104, 55 N.E. Rep. 707, was an action by the City of Chicago against Charles Netcher for a violation of an ordinance which was directed against the class of stores known as "department stores" or general stores for the sale of different kinds of merchandise divided into separate departments in the City of Chicago. In

reference to the ordinance involved in this case, the Supreme Court of Illinois said:

"The ordinance is also an attempted interference by the city with rights guaranteed to the defendant by the constitutions of the United States and of this state. The questions involved are not new. They have been before this and other courts throughout this country in numerous cases, and the rights of the citizen, as against such interference, have been frequently defined, and uniformly upheld. These constitutions insure to every person liberty, and the protection of his property rights, and provide that he shall not be deprived of life, liberty or property without due process of law. The liberty of the citizen includes the right to acquire property, to own and use it, to buy and sell it. It is a necessary incident to the ownership of property that the owner shall have a right to sell or barter it, and this right is protected by the constitutions as such an incident of ownership. When an owner is deprived of the right to expose for sale and sell his property, he is deprived of property, within the meaning of the constitution, by taking away one of the incidents of ownership. Liberty includes the right to pursue such honest calling or avocation as the citizen may choose, subject only to such restrictions as may be necessary for the protection of the public health, morals, safety, and welfare. The state, for the purpose of public protection, may, in the proper exercise of the police power, impose restrictions and regulations; but the right to acquire and dispose of property is subject only to that power. The individual may pursue, without let or hindrance from any one, all such callings or pursuits as are innocent in themselves, and not injurious to the public. These are fundamental rights of every person living under this government. The legislature can neither, by an enactment of its own, interfere with such rights, nor authorize a municipal corporation to do so. *Frorer v. People,* 141 Ill. 171, 31 N. E. 395; *Ramsey v. People,* 142 Ill. 380, 32 N. E. 364; *Braceville Coal Co. v. People,* 147 Ill. 66, 35 N. E. 62; Cooley, Const. Lim. * 393."

IV.

Police Powers.

It must be candidly admitted that the obligations of contracts and vested rights are not beyond legislative control, but are subject to certain limitations which the State may lawfully impose in the exercise of its police power; but police power cannot be put forward as an excuse for oppressive and unjust legislation.

Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious; but this power can only be put forward and lawfully resorted to for the purpose of preserving the public health, safety or morals, or in the abatement of public nuisances; and though it may be claimed by the appellee that the ordinance in question in this case is a police regulation, we submit to the judgment of this court that this ordinance and the object for which it was adopted was not a proper exercise of the police power.

The question whether or not the ordinance of March 3rd, 1902, is a proper police regulation deserves the gravest consideration of this Court.

It is our contention that this ordinance is not a police regulation, and does not come within the power of the City of Los Angeles in reference to police regulations; that it is not within the police regulations as defined and recognized and not within the sovereign police power of the State itself, and we there-

fore contend that it impairs the obligation of the contract which the appellant was bound to fulfill and was in violation of the vested rights acquired by appellant and its employer, Caroline W. Dobbins.

In discussing this question as to the police power of the State, where vested rights are involved, and as to the duty and power of this Court, we desire to call the attention of this Court to the expression that is used by the Supreme Court of the State of New York in the case of *People v. Budd*, 117 N. Y. 1, where the court said:

"The generality of terms employed by jurists and publicists in defining the [police] power, while they show its breadth and the universality of its presence, nevertheless leaves its boundaries and limitations indefinite, and imposes upon the court the necessity, as each case arises, to determine whether the particular statute falls within or outside of its appropriate limits."

In *Lawton v. Steele*, 152 U. S. 133, Mr. Justice Brown, rendering the opinion of this Court, says:

"It [the police power] is universally conceded to include everything essential to public safety, health and morals, and to justify destruction or abatement by summary proceedings of whatever may be regarded as public nuisances * * * To justify the State in thus interposing its authority in behalf of the public it must appear, *first*, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, *second*, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under guise of protecting public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination of what is a

proper exercise of the police power is not final or conclusive, but is subject to the supervision of the courts."

So it is for this Court to determine question now presented whether this particular ordinance belongs or does not belong within the police power and whether it interferes with the vested rights we have acquired.

This ordinance is not within the appropriate limits of the police power as we understand it. We understand the police power, as defined, to have reference to *those things which affect the public health, the public safety, the public comfort or the public morals.* If they do not affect those things they are arbitrary exercises of the legislative power and if they affect vested rights the courts will not sustain them.

In the case of *Noel v. People,* 187 Ill. 587; 58 N. E. Rep. 616, the Supreme Court of Illinois said:

"Undoubtedly the legislature has the right, under the police power, to pass enactments for the benefit and promotion of the public health. But it is well settled that the exercise of the police power must be limited to such measures as are designed to promote the public health, the public morals, the public safety, or the public welfare. *City of Chicago v. Netcher,* 183 Ill., 104, 55 N. E. 707. When it can be seen from the provisions of a statute that it has no tendency to promote the public health, safety, morals, comfort, or welfare, the courts are authorized to declare it invalid."

In that case the Supreme Court of Illinois quoted with approval from the case of *State v. Donaldson,* 41 Minn. 74, 42 N. W. 781, where the Supreme Court of Minnesota said:

"In the absence of some other regulations, a statute merely limiting the sale of patent regulations, a statute merely limiting the sale of patent medicines to a particular class would not and could

not have any natural or reasonable tendency to protect the public. Such a law would not go far enough to amount to a police regulation. It would be merely giving a certain class of men a monopoly of the trade. This is not within the police power of this State. * * * A law enacted in the exercise of the police power must in fact be a police law. If it be a law for the protection of public health, it must be a health law having some relation to public health. * * * If it is apparent on the face of the act that its provisions, from the very nature, cannot and will not conduce to any legitimate police purpose, it is the right as well as the duty of the court to pronounce it invalid, as in excess of legislative power, and an arbitrary and unwarranted interference with the right of the citizen to pursue any lawful occupation."

In *Chicago v. Netcher, supra,* the Supreme Court of Illinois further said:

"In order to sustain legislative interference with the business of the citizen by virtue of the police power, it is necessary that the act should have some reasonable relation to the subjects included in such power. If it is claimed that the statute or ordinance is referable to the police power, the court must be able to see that it tends, in some degree, towards the prevention of offenses, or the preservation of the public health, morals, safety, or welfare. It must be apparent that some such end is the one actually intended, and that there is some connection between the provisions of the law and such purpose. If it is manifest that the statute or ordinance has no such object, but, under the guise of a police regulation, is an invasion of the property rights of the individual, it is the duty of the court to declare it void. *Braceville Coal Co. v. People, supra; Eden v. People,* 161 Ill. 296, 43 N. E. 1108; Cooley, Const. Lim. 577. It is not claimed in the argument for the city that the selling of the different kinds of merchandise mentioned in the ordinance in the same building tends in any way to affect the safety, health, morals, comfort, or welfare of the public. No attempt is made to suggest any

grounds upon which the ordinance can be justified as an exercise of the police power of the city or the state. It certainly cannot be contended that there is anything in the character of dry goods, clothing, jewelry, and drugs which renders it dangerous to the public, or inimical to the general welfare, that they should be sold in the same building with provisions. General stores have always dealt in all kinds of merchandise, and no one has ever imagined that the comfort, safety, or welfare of the public was in any manner or to any extent injured or prejudiced by them. Public health and public comfort are in no way affected by selling the different kinds of merchandise enumerated in different departments of the same building, and would not be if the same clerk should sell them, nor would the public welfare or comfort be increased by compelling a customer to buy one kind of merchandise in one store and another in some other store. In *Meyers v. Baker,* 120 Ill., 567, 12 N. E. 79, the act prohibiting the establishment of a tent, booth, or place of vending provisions or refreshments within a certain distance of a camp meeting was sustained as a police regulation tending to prevent disturbance or disorderly conduct. But this ordinance has no such purpose. It is plain that its object is not to protect the health, morals, or safety of the public, or to accomplish any object falling within the police power. It is a mere attempt to deny a property right to a particular class in the community, where all other members of the community are left to enjoy it. It is immaterial whether such a denial is in a statute or in an ordinance passed by virtue of a statute. It is equally invalid in either case."

The police power of the State of California is a sovereign power. It does not exist by virtue of the grant of the constitution of that State. The provisions of the constitution of that State in reference thereto are not a grant of the police power. The police power, like the power of eminent domain and the power of taxation is a sovereign power within the people of the

State prior to the adoption of the constitution. Sec. 11 of Art. XI of the constitution of the State of California is not, therefore, a grant of police power but it is an extension to the counties, cities, towns or townships of the State of the right to exercise the powers that are inherent in the legislature as the representative of the people. That is the scope of Section 11 of Article XI of the constitution of that State. It is therein provided "that any county, city, town or township may make or enforce within its limits all such local police, sanitary or other regulations as are not in conflict with general laws." The provisions of this constitution are simply a grant to the municipal authorities to exercise a power which is inherent in the State. It does not enlarge upon that power or give the municipality any power which the legislature itself did not have; namely a right to exercise the police power by virtue of its sovereignty; and the police power is not enlarged by virtue of the terms of the provisions of this constitution. It is as it always was, the right of the people to legislate in reference to those things which promote the public health, the public comfort, the public safety or the public morals.

It was not intended by either the constitution of that state, or any statute passed prior to its adoption, to vest in the City of Los Angeles police powers in excess of those which states or municipalities exercised prior to the adoption of the constitution of the state of California, and it cannot be successfully asserted that the City of Los Angeles has today any police power

which is superior to and more far-reaching than that which the common law recognizes as inherent in states and as possessed by municipalities to whom that police power upon certain subjects had been delegated.

Ex parte Campbell, 74 Cal. 20;

Ex parte Roach, 104 Cal. 272.

The following authorities clearly define the police power and are applicable to the case at bar, and distinguish the case at bar from the authorities relied upon by the defendant in the court below.

The case of the *City of Indianapolis v. Consumers' Gas Trust Company*, 39 N. E. Rep. (Ind.) 433, was prosecuted by the city of Indianapolis against the Consumer's Gas Trust Company for the violation of a city ordinance. By the general ordinance passed by the city of Indianapolis on the 27th day of June, 1887, it was provided that any corporation could maintain, lay or extend and maintain mains, pipes, etc., through the streets, etc., of said city, and may take up for the purpose of altering, changing or repairing the same, as the necessities of the case may require, for the purpose of supplying such city and its inhabitants with natural gas under certain restrictions and conditions prescribed in the ordinance. Afterwards, in 1890, the City Council of the city of Indianapolis passed an ordinance making it unlawful for any person, firm or corporation to cut or dig into any street or alley that may theretofore have been paved with brick, or any form of block, macadam or asphaltic pavement, until such person, firm or corporation, for whose benefit such proposed opening was to be made, should have first secured the consent

of the common council and board of aldermen so to do, and should have filed in the office of the city a bond conditioned to protect the city from all liability on account of the proposed opening of said street. For the alleged violation of this city ordinance the prosecutions were commenced against the defendant and it was contended that the defendant having complied in all respects with the provisions of the ordinance of June 1887, that the ordinance of 1890 was invalid in that it impaired the obligation of the legislative contract between appellant and appellee by virtue of the ordinance of 1887. It was contended by the city, that notwithstanding the passage of the first ordinance and the acceptance thereof by the Gas Company constituted a contract, yet it was subject to the exercise of the police power upon the part of the city, which power could not be bargained away, and that the ordinance of 1890 was a valid exercise of that power. In reference to this ordinance and this question, the Supreme Court of Indiana, page 436, said:

"There was no compulsion on the part of the appellant to grant the privilege to use its streets to any particular company. It was within its discretion to give or not to give its consent, and it had the right to withhold it from all gas companies. *Gas & Min. Co. v. Town of Elwood*, 114 Ind. 332, 16 N. E. 624. It was not limited alone to the granting of the franchise, but it had the right to prescribe and impose terms and conditions. Dill Mun. Corp. Sec. 706; 2 Wood, Ry. Law, p. 986. Elliott Roads, & S., p. 465. When these terms and conditions proposed by appellant were accepted by the appellee, and complied with, it became a binding contract. *Western P. & S. Co. v. Citizens' St. R. Co.*, 128 Ind. 531, 26 N. E. 188, and 28 N. E. 88. But the appellant contends that such grants are but the exer-

cise of police power, and may be changed or repealed by the granting power. It is true, that, in grants to persons or corporations to supply gas and the like to the inhabitants of towns or cities, the municipality does not part with or bargain away its right, under the police power, to protect the public health, the public morals, and public safety, as the one or the other may be affected by the exercise of the franchise by the grantee. *New Orleans Gaslight Co. v. Louisiana etc., Manuf'g. Co.*, 115 U. S. 650, Beach Pub. Corp. Secs. 713, 990, 1229, 1230. In the case of *City of Indianapolis v. Indianapolis Gaslight & Coke Co., supra*, it was contended, upon the part of the city, that the contract in controversy was a restriction upon the legislative power to regulate the lighting of the streets. But this court, in that case, draw the distinction between the legislative and contractual powers of municipal bodies as follows: 'These two powers need not be confounded. The exercise of the legislative power requires the consent of no person, except those who legislate, while it is impossible to make a contract without the consent of another or others. We think, therefore, that, when the city of Indianapolis made the contract in question with the gaslight company, it made it in the exercise of its power to contract, and not in the exercise of its powers to legislate, although the power to make the contract was authorized by an ordinance; and, having the power to make a contract touching the subject-matter, it had the right to make it according to its own discretion as to its prudence or good policy, within the limits of its franchise. Nor can we see that the contract in the least restricts the legislative powers of the city, except that, as the sanctity of the contract is shielded by the Constitution of the United States, it cannot, in the exercise of its legislative power, impair its validity; for it would be a solecism to hold that a municipal corporation can impair the validity of a contract, when the state which created the corporation, by its most solemn acts, has no such power.' See, also *Insurance Co. v. Debolt*, 16 How. 416. The appellant cites *Stone v. Mississippi*, 101 U. S. 814, in the support of its contention that the grant to appellee to use the streets was the exercise of

its police power; but this case decides only that the abolition of a lottery was clearly within this power, as lotteries are contrary to public morals. The case has no bearing upon the rules which the appellant insists ought to be applied in the case now before us. Chief Justice Waite, in this case, speaking for the court, on page 818 of the opinion, said: 'Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself, which will be in all respects accurate. No one, however, denies that it extends to all matters affecting the public health or the public morals.' This, we think enunciates the true rule. We cannot agree, and hold with the appellant that the second ordinance upon which this prosecution is based should be regarded as an exercise of the police power under discussion, so as to bind the appellee, under the facts alleged in its answer, and thereby compel it to comply with its terms and conditions in the exercise of the rights granted to it by the first ordinance."

The case of *Barthet v. City of New Orleans*, 24 Fed. Rep. 564, is also directly in point, and in this case the City of New Orleans attempted to do what the City of Los Angeles is now attempting to do, and having once established a district, they attempted to restrict it. It appeared in this case that by several ordinances adopted the City of New Orleans designated the place at which the slaughtering of cattle might be carried on, and prescribed in detail the regulations under which said business could be conducted. The complainant, a citizen of France, whose trade and business was the slaughtering of cattle for food, desiring and intending to engage in such business in New Orleans, leased, with the privilege of buying, two squares of land situate within the limits prescribed by city ordinance, and pro-

ceeded to repair such buildings and construct on said ground other buildings and improvements suitable for the trade in which he is engaged, investing in said improvements a considerable sum of money. Subsequently, on May 19th, an ordinance was passed by the Council which is styled "An ordinance amending ordinance 7,336, as passed September 13, 1881, designating the places for slaughtering animals intended for food under article 248 of the constitution." The original ordinance provided that "It shall be lawful for any person or corporation to keep and maintain slaughter houses, etc., within certain limits, under certain regulations." The amendment mentioned makes it unlawful to keep and maintain slaughter houses within said limits prescribed in the original ordinance and under said regulation "except permission be granted by the Council of the City of New Orleans." The court said:

"It appears that defendant corporation intends actively to enforce, or attempt to enforce, as against Barthet, the amended ordinance; that it is about to obstruct, hinder, and prevent him from carrying on his legal business in the limits already laid out in pursuance of article 248.

"The complainant, alleging that, acting on the good faith of said articles and ordinances, he has acquired vested rights, and that the ordinance of May 19th is unconstitutional, brings a bill for injunction to enjoin and restrain the defendant from interfering in any manner with him in carrying on his business. * * * * *

"If the amendment of May 19th becomes operative as a law, the investment made by Barthet, on the faith of the law existing when he erected his buildings, will be lost or greatly diminished in value and his privilege, which is of more value, may be wholly destroyed by refusal of the city. It is urged in argument that the

corporation is a legislative body, endowed with police powers, to be exercised with absolute discretion; that this court has no power to control or limit its action in directing when, and upon what particular lot in the territory laid out and defined by the city, Barthet, or any other person following the same business, may locate and carry on his business of slaughtering animals for food. The proposition of the city attorney, in view of the many cases that have been decided by the State and Federal courts, in which just such assumptions of power have been contended for and denied to municipal authorities, need not now be considered, further than to say that the court does not think the proposition maintainable under the law and facts found on the hearing of this bill. * * *

"Our opinion will be better understood when we say that the city authorities have no power, legislative, judicial, or administrative, to pass the ordinance complained of; because the power, by whatever name it may be called, delegated to the city in articles 248, 258, as far as Barthet is now concerned, was exhausted when the city officials laid out the limits in which it was declared lawful to slaughter animals for food."

The case of the *City of Buffalo v. Chadeayne*, (N.Y.) 31 N. E. Rep. 443, is a case where the City of Buffalo, having prescribed certain fire limits and having given permit to a citizen of Buffalo to erect seven frame buildings within that district, subsequently after he had his foundations laid, changed the district and prosecuted him for a violation of the ordinance by which they attempted to restrict the district. In that respect it is similar to the case at bar. The court said:

"This action was brought to recover a penalty for an alleged violation of an ordinance pertaining to the erection of wooden buildings within the prescribed fire limits of the city of Buffalo. On the 11th day of July, 1887, the Common Council of the city passed a resolution granting permission to the defendant to erect seven frame wooden houses upon premises owned by him, and

specifically described. The resolution was duly approved by the mayor, and thereupon, the defendant entered into a contract for the materials with which to make such structures. He made excavations for the cellars, and laid a portion of the walls prior to the 1st day of August. On that day the Common Council, without notice to him, passed a resolution which it is claimed rescinds the former resolution. The last resolution was approved by the mayor on the 15th day of August, and on the 10th day of November a copy thereof was served upon the defendant. Oral notice was given to him of the passage of the resolution on the 2nd day of August, prior to its approval by the mayor. He, however, continued the construction of his buildings, and at the time the notice, with a copy of the resolution, was served upon him in November, several of the buildings had their roofs on, and the rest were in process of construction. This action was then brought for the penalty provided for in the ordinance, and resulted in the judgment which is the subject of this review. The charter of the plaintiff [chapter 519, Laws 1870] provides that 'the city shall have power by its Common Council from time to time to enact ordinances, * * * to prescribe the limits within which wooden buildings shall be erected, and the manner in and material of which all buildings shall be constructed within such limits. Every building erected or placed contrary to any ordinance passed under the last above provision shall be deemed a common nuisance, and may be abated as such.' Title 3, Sec. 8, Subd. 4. Pursuant to this provision, the Common Council enacted ordinances, among which we find the following: 'No person shall, without permission of the Common Council, erect, place, or move any building, constructed in whole or in part of wood, within the limits of the city of Buffalo, as defined by Section 2 of Title 1 of the charter of said city.' Ord. c. 5, Sec. 20. The defendant's buildings are within the fire limits, as prescribed by the ordinance. He therefore had no right to construct them without the permission of the Common Council. Such permission, as we have seen, was granted on the 11th day of July, 1887, and thereby he acquired the right to

proceed with the construction of his buildings, and to possess and enjoy the comforts they might afford. As soon as he had entered upon the construction of the buildings, and incurred liabilities for the work and material, he had a property interest in them. In this right he was entitled to protection. *People v. O'Brien*, 111 N. Y. 1-62, 18 N. E. Rep. 692; *In re Union El. R. of Brooklyn*, 112 N. Y. 61-75, 19 N. E. Rep. 664; *People v. Otis*, 90 N. Y. 48-52; *Stuart v. Palmer*, 74 N. Y. 183; *Detroit v. Plank-Road Co.*, 43 Mich. 140, 5 N. W. Rep. 275.

"It is claimed by the appellant that a municipal board may reconsider its action at any time before private vested rights have resulted from such action, and that the defendant could not acquire vested rights as against the police power of the state or municipality. For the purposes of this case we may concede these propositions. As to the first, it appears, as we have seen, that the defendant had entered upon the construction of his buildings, had made contracts, and incurred liabilities thereon, before the Common Council attempted to reconsider its action, giving him a permit to construct of wood. A private property right had, therefore vested in him prior to the rescission of the resolution. As to the second, his right may be subject to the police power of the State, but the difficulty is that the State has not seen fit to deprive him of such right by the exercise of such power, nor has it delegated the same to the municipality. The State has given to the municipality power to prescribe the limits in which wooden buildings shall not be erected. This pertains to the future, and not to existing wooden buildings. The ordinance to which we have referred provides that no person shall, without permission of the Common Council, erect any building in whole or in part of wood, within certain limits. This has reference to buildings that shall be erected in the future, and not existing buildings, or to those erected with the permission of the Common Council. So that neither the charter nor the ordinance authorizes it to interfere with existing buildings, or those constructed with its permission. There is consequently no power

given to the Common Council to deprive the defendant of any vested property rights in the buildings. If the Common Council could interfere and rescind its permit after a building is partially constructed, it could also rescind after it was fully completed. It would consequently follow that every person who in the past has constructed wooden buildings with the permission of the Common Council is now liable to have his permit revoked, and his buildings declared a nuisance, and abated as such. The restrictions authorized by the provisions of the charter under consideration are for the purpose of the prevention and extinguishment of fires. They have no reference to buildings that may become a nuisance by reason of their becoming dangerous to the public. Having in view the purpose for which the provision was enacted, it seems to us clear that it was not intended to give to the Common Council the power to deprive persons of their buildings which had previously been erected, or of those which should be thereafter erected, in whole or in part, with the permission of the Common Council; and that its power is limited to the prevention of the erection of wooden buildings in the future without its permit."

This is the latest case in the Court of Appeals of New York having reference to this subject.

It is of vital importance in arriving at a conclusion in this case to bear in mind that the police power has only to do with those things that affect the public health, the public morals, the public comfort or the public safety. This is demonstrated and insisted upon by this Court as the real criterion of all these questions as to the exercise of the police powers.

The cases relied upon by counsel for the defendant in the court below, as for instance the case of *Beer Company v. Massachusetts*, 97 U. S. 25, a beer case; *Fertilizing Company v. Hyde Park*, 97 U. S. 659, a

fertilizing case; and *Stone v. Mississippi,* 101 U. S. 814, a lottery case, are all well recognized as being within the police power. This case of the *Hyde Park Fertilizing Company* is one of the strongest cases reported, where permission was given by a charter granted by the legislature of the State of Illinois, to the fertilizing company to erect fertilizing works within the town of Hyde Park. Subsequently, the growth of the city of Chicago was such that these works became a nuisance and the city authorities of the town of Hyde Park passed an ordinance absolutely prohibiting carrying on the manufacturing of fertilizers and rendering business within the town of Hyde Park, although this work had been carried on by this company for ten years by virtue of the charter of the legislature, and they had expended upon their works upwards of $200,000.

This Court sustained the ordinance passed by the town authorities of the town of Hyde Park because it said it came directly within the definition of the police power in that it affected the public health and the public comfort.

This case is an illustration of a well recognized principle that the great police power is not bound to recognize a condition or state of things existing today as beyond change at its hands in time to come, when changed conditions occur and public welfare demands alteration and increased exercise of police power in restraint of privileges once established. A business once harmless and lawful under an altered condition of things may later on become hurtful to the public, and

in that event may be restrained in its transactions. That is not the case at bar.

Take, however, the case of *New Orleans Gas Company v. Louisiana Light Company,* 115 U. S. 650, and we come to a different line of authorities and we find there the distinction well pointed out by Mr. Justice Harlan, who rendered the opinion of this Court, and which is the distinction which should always be borne in mind in the determination of the question whether or not an ordinance is a police regulation.

Is the object sought to be attained the abatement and destruction of that which affects the public health, the public safety or the public morals? If it does not, it is not within the police power of the State; and if it affects vested rights, it is the taking of private property without due process of law. If it interferes with the lawful occupation of a citizen, it interferes with his rights, privileges and immunities.

Mr. Justice Harlan for this Court makes this distinction in the case of *New Orleans Gas Company v. Louisiana Light Company, supra,* and this Conrt has adhered to the doctrine laid down in that case; and in the case of *Walla Walla v. Walla Walla Water Company,* 172 U. S. 1, 15, has reiterated the same doctrine.

Mr. Justice Harlan in the case of *New Orleans Gas Co. v. Louisiana Light Co.,* in delivering the opinion of this Court, used this language:

"The principle upon which the decisions in *Beer Co. v. Massachusetts,* (97 U. S. 25), *Fertilizing Co. v. Hyde Park,* (97 U. S.

659), *Stone v. Mississippi* (101 U. S. 814), and *Butchers' Union Co. v. Crescent City Live-Stock Landing Co.* (111 U. S. 746), rest, is, that one legislature cannot so limit the discretion of its successors, that they may not enact such laws as are necessary to protect the public health, or the public morals. That principle, it may be observed, was announced with reference to particular kinds of private business which, in whatever manner conducted, were detrimental to the public health or the public morals. It is fairly the result of those cases, that statutory authority given by the State to corporations or individuals to engage in a particular private business attended by such results, while it protects them for the time against public prosecution, does not constitute a contract preventing the withdrawal of such authority, or the granting of it to others.

"The present case involves no such considerations. We have seen the manufacture of gas, and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in which everyone may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity for which the State may make provision. It is one which, so far from affecting the public injuriously, has become one of the most important agencies of civilization, for the promotion of public convenience and the public safety."

We strenuously contend that in the erection of these gas works that there is nothing unlawful and that when we come to maintain these works, if we maintain a nuisance the city authorities have a right under changed conditions to regulate it and make us cease maintaining a nuisance, or if we charge for gas more than we ought to, they have a right to regulate that; but they have no right to absolutely drive us out of business and say we shall not erect a building in which we are going

to manufacture gas. The erection of gas works does not constitute a public offense in any respect whatsoever; nor does their maintenance, unless it is judicially determined it is a nuisance.

Continuing from the *New Orleans Gas Company's* case this Court says:

"Whatever therefore in the manufacture or distribution of gas in the city of New Orleans proves to be injurious to the public health, the public comfort, or the public safety, may, notwithstanding the exclusive grant to plaintiff, be prohibited by legislation, or by municipal ordinance passed under legislative authority. It cannot be said with propriety, that to sustain that grant is to obstruct the State in the exercise of her power to provide for the public protection, health and safety. The article in the State Constitution of 1879 in relation to monopolies is not in any legal sense an exercise of the police power for the preservation of the public health, or the promotion of the public safety; for the exclusiveness of a grant has no relation whatever to the public health or to the public safety. These considerations depend upon the nature of the business or duty to which the grant relates, and not at all upon the inquiry whether a franchise is exercised by one rather than by many."

And so we insist that the facts that distinguish these cases whether or not they are within the police power is this: Do they affect the public health, the public safety, the public comfort or the public morals? If they do not, they are not within the proper exercise of the police power and the police regulation.

In the case of *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 15, this Court said:

"The argument that the contract is void as an attempt to barter away the legislative power of the City Council rests upon the assumption that contracts for supplying a city with water are within the police power

of the city, and may be controlled, managed or abrogated at the pleasure of the council. This court has doubtless held that the police power is one which remains constantly under the control of the legislative authority, and that a City Council can neither bind itself nor its successors, to contracts prejudicial to the peace, good order, health or morals of its inhabitants; but it is to cases of this class that these rulings have been confined. If a contract be objectionable in itself upon these grounds, or if it becomes so in its execution, the municipality may, in the exercise of its police power, regulate the manner in which it may be carried out, or, may abrogate it entirely, upon the principles that it cannot bind itself to any course of action which shall prove deleterious to the health or morals of its inhabitants. In such case an appeal to the contract clause of the constitution is ineffectual. Thus in *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, an act of the General Assembly of Illinois authorized the Fertilizing Company to establish and maintain for fifty years certain chemical works for the purpose of converting dead animals into agricultural fertilizers, and to maintain depots in Chicago for the purpose of receiving and carrying out of the city dead animals and other animal matter which it might own or buy. Subsequently, the charter of the village of Hyde Park was revised, and power given it to define or abate nuisances injurious to the public health. It was held that under this power the village had the right to prohibit the carrying of dead animals, or offensive matter, through the streets; that the charter of the company was a sufficient license until revoked, but was not a contract guaranteeing that the company might continue to carry on a business which had become a nuisance by the growth of population around its works, or that it should be exempt for fifty years from an exercise of the police power of the State, citing *Coates v. Mayor &c. of New York*, 7 Cowen, 585.

"Substantially, the same ruling was made in *Butchers Union Co.* v. *Crescent City &c. Co.* 111 U. S. 746, wherein an act of the legislature of Louisiana, granting exclusive privileges for maintaining slaugh-

ter houses, was held to be subject to subsequent ordinances of the city of New Orleans opening to general competition the right to build slaughter houses.

"The same principle has been applied to charters for the maintenance of lotteries which, upon grounds of public policy, have been held to be mere licenses and subject to abrogation in the exercise of the police power of the government; *Boyd v. Alabama*, 94 U. S. 645; *Stone v. Mississippi*, 101 U. S. 814; *Douglas v. Kentucky*, 168 U. S. 488; as well as to laws regulating the liquor traffic, *Beer Co. v. Massachusetts*, 97 U. S. 25; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; and even laws regulating the inspection of coal oil; *United States v. De Witt*, 9 Wall. 41; *Patterson v. Kentucky*, 97 U. S. 501. In the latter case it was held that a person holding a patent under the laws of the United States for an invention was not protected by such patent in selling oil condemned by a state inspector as unsafe for illuminating purposes.

"Under this power and the analogous power of taxation we should have no doubt that the City Council might take such measures as were necessary or prudent to secure the purity of the water furnished under the contract of the company, and the payment of its just contributions to the public burdens, and the observance of its own ordinances respecting the manner in which the pipes and mains of the company should be laid through the streets of the city. *New York v. Squire*, 145 U. S. 175; *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92; *Laclede Gas Light Co. v. Murphy*, 170 U. S. 78. But where a contract for a supply of water is innocuous in itself and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it."

In the manufacture of gas there is nothing that will affect the public health or the public safety. It is alleged in the complaint in this case that the gas works in question are being erected upon concrete foundations with a superstructure of brick, steel and iron, of the

best material procurable, and are not combustible and that the same are so firmly and substantially constructed that there can be no danger from explosions, bursting or leakage; that all the machinery now in place therein or to be placed therein is of the most approved pattern, and constructed in accordance with the latest devices and improvements known in the manufacture of gas; that said works can and will be operated and maintained by the said Caroline W. Dobbins, by the use of the said devices and improvements and the said machinery therein contained, so that there will be no leakage or escape of odors, and that the same will not create a nuisance and will not interfere in any way with the health, comfort, safety or welfare of the inhabitants of the said district and territory in which the said gas works are located upon the premises of the said Caroline W. Dobbins, or of any other of the inhabitants of said City of Los Angeles.

The demurrer of the defendant admits the facts thus pleaded in the complaint as true. Until we have had an opportunity of testing this question, the city authorities have no right to interfere and exercise this so-called police power.

It will be for the counsel for appellee to show any case in which the police power has been sustained and allowed to infringe upon vested rights, except in those cases which affect the public health, comfort, safety or welfare, and it will be for them to show that in the nature of the case under a police power a municipal authority has been allowed to restrain the prosecution of any business or enterprise which does

not so infringe upon the public health, public comfort, public welfare or public safety.

It will not be sufficient for them to cite the case of *ex parte Lacey*, 108 Cal. 326, where an ordinance for the establishment of a steam carpet beating machine was sustained, as that was a health ordinance, and the City of Los Angeles cannot pass, under the guise of a health measure, an ordinance that has no relation whatever to the public health; the *Slaughterhouse Cases*, 16 Wallace 36, which were health regulations; the case of *Barbier v. Connolly*, 113 U. S. 27, in reference to the conduct of a public laundry between the hours of ten o'clock at night and six o'clock in the morning, which had reference to a fire regulation; or the case of *Knoxville v. Bird*, 12 Lea 121, which had reference to a fire limits ordinance and affected the public safety; or the case of *Davenport v. City of Richmond*, 81 Virginia, 636, where the ordinance in question was in reference to the keeping and selling of gun powder and affected the public safety; or lottery cases, which affect the public morals. It will be for the learned counsel for the appellee to show any case in which the police power has been allowed to infringe upon vested rights by determining that any enterprise was a nuisance unless the same was a nuisance *per se*.

V.

THIS ORDINANCE IS INVALID BECAUSE IT IS AN ATTEMPT ON THE PART OF THE CITY COUNCIL OF THE CITY OF LOS ANGELES TO DEFINE AND MAKE THAT A NUISANCE WHICH IS NOT A NUISANCE PER SE.

It is our contention that it is not within the power of the City of Los Angeles to adopt any ordinance which will make a nuisance of that which is not a nuisance *per se,* nor could such a declaration make it a nuisance unless it in fact had that character; and that the City Council may not by a mere resolution or motion declare a particular thing a nuisance which has not been theretofore pronounced such by law or so adjudged by judicial determination.

The ordinances in question make it unlawful to erect or maintain any works for the manufacture of gas. In the erection of a gas works there certainly cannot be created a nuisance, and it cannot be determined by the mere passage of an ordinance that the maintenance of a gas works will be a nuisance. The allegations of the bill in this case are neither that in its erection nor maintenance will the gas works not interfere in any way with the health, comfort, safety or welfare of the inhabitants of the district in which it is located, or of the City of Los Angeles.

We contend that this ordinance is too sweeping and too broad and that there is nothing in the law or in the Charter provisions of the City of Los Angeles or in the Constitution of the State of California that au-

thorizes the City of Los Angeles to pass an ordinance which makes that a nuisance which is not a nuisance *per se*; that in the erection of gas works in itself there is no nuisance, and we assert that the courts have decided in many cases that the mere designation of the legislative body that a certain thing is a nuisance which is not a nuisance or which the courts have not determined to be a nuisance does not make it a nuisance, and the legislative act is in that respect always subject to judicial scrutiny and revision.

This Court in the case of *Yates v. Milwaukee*, 10 Wall. 497 said:

"The act of the Wisconsin legislature, approved March 31st, 1854, confers upon the city of Milwaukee the authority to establish dock and wharf lines on the banks of the Milwaukee and Menomonee Rivers, and restrain and prevent encroachments upon said rivers and obstructions thereto, and it is said, by this statute that the summary proceedings for the removal of appellant's wharf are supposed to be authorized. But the mere declaration by the city Council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities. Yet this seems to have been the view taken by counsel who defended this case in the Circuit Court; for that single ordinance of the city, declaring the wharf of Yates a nuisance, and ordering its abatement, is the only evidence in the record

that it is a nuisance or an obstruction to navigation, or in any manner injurious to the public."

The same doctrine is laid down in *C. R. I. & P. R. R. v. Joliet*, 79 Ill. 25, 44; *Everett v. Council Bluffs*, 46 Iowa, 66.

The case of the *City of Denver v. Mullen*, (Colo.) 3 Pacific Rep. 693, was an action brought against the City of Denver for an injunction to restrain it from interfering with the flow of the water in the Platt and Denver ditch. The basis of authority for the action of the city in the premises was made to rest upon certain provisions of the City Charter and certain ordinances, authorizing the city "to make regulations to secure the general health of the inhabitants, to declare what shall be a nuisance, and to prevent and remove the same."

The Supreme Court of Colorado in deciding this case said:

"The proper construction of this language is that the city is clothed with authority to declare by general ordinance what shall constitute a nuisance; that is to say, the city may by such ordinance define, classify, and enact what things or classes of things and under what conditions and circumstances such specified things, are to constitute and be deemed nuisances. For instance, the city might under such authority, declare by ordinance that slaughter- houses within the limits of the city, carcasses of dead animals left lying within the city, goods, boxes, and the like, piled up or remaining for a certain length of time on the sidewalks, or other things injurious to health, or causing obstruction or danger to the public in the use of the streets and sidewalks, should be deemed nuisances; not that the city council may, by a mere resolution or motion, declare any particular thing a nuisance which has not theretofore been pronounced to be such by law, or so adjudged by judicial determination. *Everett v. Coun-*

cil Bluffs, 46 Iowa, 66; *Yates v. Milwaukee,* 10 Wall. 497. * * *

"It is only certain kinds of nuisances that may be removed or abated by the acts of individuals or by the public, such as those which affect the health, or interfere with the safety of property or person, or are tangible obstructions to streets and highways under circumstances presenting an emergency. Such clear cases of nuisances *per se* are well understood, and need not be further noticed here, to distinguish them from the cases before us. If it were admitted that this ditch, by reason of its obstruction to the use of the public streets at the time of the acts complained of, was a nuisance, it must also be admitted that it was not a nuisance *per se.* It was constructed for a necessary, useful, and lawful purpose, was used for such purpose, and therefore in its nature was not a nuisance, as a matter of law. Nor, as a matter of fact, was it a nuisance while it was no hurt, detriment, or offense to the public, or to any private citizen. If, then, it has become a nuisance, it is by reason of a change of circumstances brought about, neither by the ditch itself nor its use."

In *ex parte Sing Lee,* 96 Cal. 354, it appears that the petitioner had been arrested for violating an ordinance making it unlawful to establish, maintain and carry on the business of a public laundry, without first having obtained the permit from the Board of Trustees. Of this ordinance the Supreme Court of California said:

"It is provided by Sec. 11 of Article XI of the constitution of this State, that 'any county, city, town or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws,' and it is argued here, in behalf of the respondent, that the ordinance in question is a police regulation, and therefore one which the town of Chico was authorized to enact by this section of the constitution. The power conferred upon cities and towns by the section just quoted is undoubtedly

a very broad and comprehensive one, and would sustain the enactment of any ordinance having a reasonable tendency to promote the health, the comfort, safety, and welfare of the inhabitants of the municipality, and which would not be in conflict with some general law of the State. But, broad as is this power, the ordinance before us cannot be considered as falling within the limits of its proper exercise.

"The business of conducting a laundry is a lawful occupation, precisely as much so as is that of the carpenter, blacksmith, or merchant, and is not of itself, and irrespective of the manner in which it is conducted, offensive or dangerous to the health of those living within its vicinity. * * *"

The case of the *County of Los Angeles v. The Hollywood Cemetery Association,* 124 Cal. 344, was a bill for an injunction to restrain the defendant from establishing a cemetery upon certain lands, in violation of the ordinance prohibiting the location or establishing of a cemetery within the limits of the County of Los Angeles without permission of the Board of Supervisors. It was held in that case that the ordinance was not a reasonable exercise of the police power and that it was not unlawful to establish a cemetery for the burial of the dead, deriving profit therefrom, as a business enterprise.

Grossman v. Oakland (Oregon) 36 L. R. A. 593.
Stockton Laundry Case, 31 Fed. 680.
In re Hong Wah, 82 Fed. Rep. 623, 624-626.
Ex parte Whitall, 98 Cal. 73.
Wood on Nuisances, Sec. 744.

The Charter of the City of Los Angeles gives the right to designate what are nuisances and to abate them, but we say that a power *to abate* does not include the

power *to prevent*. That the power to abate may some times include the power to prevent must be conceded, but it is only in those cases where a thing sought to be prevented is a nuisance *per se*, and those things which only become a nuisance because of the method of their operation cannot be prevented and stopped under the power simply to abate until it has been demonstrated that they are nuisances.

This point was decided by the Supreme Court of the State of Illinois in the case of *Lakeview v. Letz*, 44 Ill. 81-83, where the court said:

"Various powers for municipal government were conferred upon them, and among others the power 'to abate and remove nuisances, and punish the authors thereof by penalties, fines and imprisonment, and to authorize and direct the summary abatement thereof.' * * * * The act of the legislature authorizing the board of trustees 'to abate and remove nuisances,' gave them no power to pass an ordinance forbidding the establishment of a cemetery. Conceding that the power to 'abate and remove,' should be construed as including the power to prevent, yet this preventive power could only be exercised in reference to those things that are nuisances in themselves, and necessarily so. There are some things which in their nature are nuisances, and which the law recognizes as such. There are others which may or may not be so, their character in this respect depending on circumstances. Now, the town of Lake View is a rural township, containing about eleven sections or square miles of territory. It is therefore impossible to hold, that a cemetery anywhere within the limits of the town, must necessarily be a nuisance, and can be prohibited in advance as such. A cemetery may be so placed as to be injurious to the public health, and therefore a nuisance. It may, on the other hand, be so located and arranged, so planted with trees and flowering shrubs, intersected with drives and walks, and decorated with monumental marbles, as to be not

less beautiful than a public landscape garden, and as free from all reasonable objection. The power to prohibit the establishment of cemeteries except by the authority of the trustees cannot be considered as falling within the power to abate and remove nuisances."

Enough has been said to show that this ordinance of August 26th, 1901, is unreasonable and too sweeping. It is unreasonable and too broad from the fact that it attempts to say that it is unlawful to erect gas works when there is no showing but what the gas works can be maintained in a most satisfactory condition, not only to the public authorities, but to all the surrounding inhabitants.

VI.

THE ORDINANCE ADOPTED BY THE CITY COUNCIL OF THE CITY OF LOS ANGELES ON MARCH 3rd, 1902, IS INVALID AND IS NOT BINDING UPON THE APPELLANT AND IS IN VIOLATION OF THE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES PROHIBITING ANY STATE FROM MAKING OR ENFORCING ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES.

The ordinance is invalid as being in violation of the rights of appellant to engage in and conduct a lawful business in the city of Los Angeles.

Among the privileges of the citizens of the United States that cannot be abridged, is the right of carrying on a lawful business.

Brandon on the Fourteenth Amendment, p. 65.

In the case of *Corfield v. Coryell*, 4 Wash. C. C. 371, Fed. Cases No. 3230, Washington, Circuit Justice, defining the privileges and immunities of a citizen of the several states, to which citizens of each should be entitled gathers them under general heads, and among others named by him, included the right to take, hold and dispose of property, either real or personal, and the right of the citizen of one state to pass through or reside in any other state for the purpose of trade, agriculture, professional pursuits, or otherwise.

The right to engage in a lawful occupation and business is a privilege of a citizen which is fundamental.

The business of erecting gas works is a lawful occupation.

In the case of *New Orleans Gas Company v. Louisiana Light Company, supra*, this court at page 658 said:

> "It is true, as suggested in argument, that the manufacture and distribution of illuminating gas, by means of pipes or conduits placed, under legislative authority, in the streets of a town or city, is a business of a public character. Under proper management the business contributes very materially to the public convenience, while, in the absence of efficient supervision, it may disturb the comfort and endanger the health and property of the community. It also holds important relations to the public through the facilities furnished, by the lighting of streets with gas, for the detection and prevention of crime. An English historian, contrasting the London of his day with the London of the time when its streets, supplied only with oil lamps, were scenes of nightly robberies, says that 'the adventurers in gas-lights did more for the prevention of crime

than the government had done since the days of Alfred.' Knight, vol. 7, ch. 21; Macaulay, ch. 3." * * *

Ibid p. 669.

"The present case involves no such considerations. We have seen the manufacture of gas, and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in which every one may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity for which the state may make provision. It is one which, *so far from affecting the public injuriously*, has become one of the most important agencies of civilization, for the promotion of the public convenience and the public safety."

The ordinance in question provides, however, that it shall be unlawful for any person, firm or corporation to erect or cause to be erected, maintain or cause to be maintained any works, establishment, manufactory for the manufacture of gas, or any tank, reservoir or other receptacle for the storage of gas within the corporate limits of the City of Los Angeles outside of the limits of the described district. We contend that this is in violation of our rights as guaranteed to us by the Constitution of the State of California and by the Fourteenth Amendment to the Constitution of the United States.

The people of the State of California in their Constitution have wisely made provision by a constitutional grant for a franchise to those engaged in sup-

plying municipalities and the inhabitants thereof with artificial light.

The Consitution of the State of California, Section 19, Article XI, provides that

"In any city where there are no public works owned and contolled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this state, shall, under the direction of the Superintendent of Streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either was gaslight, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

It is in the record of this case that there are no public works owned or controlled by the City of Los Angeles for supplying the same with artificial light.

In reference to this provision of the Constitution c the State of California, the Supreme Court of the State of California, with the advanced spirit that has always inspired that Court to give full effect to each provision of that Constitution, in the very recent opinion rendered in *ex parte Johnston* ——, Cal.——. (69 Pac. Rep. 973, 975) said:

> "In *People v. Stephens,* 62 Cal. 209, the above section was construed by this court, and was held to be a direct grant from the people to the persons therein designated, of the right to lay pipes in the streets of a city for the purposes spe-

cified, without waiting for legislative authority, or being subject to any restrictions from that branch of the government, the court saying, with reference to the privilege of laying pipes in the public streets and thoroughfares of any city: "That privilege is expressly granted by the section of the constitution cited, subject to the direction of the Superintendent of Streets or other officer in control thereof, and under such general regulation as the municipality may prescribe for damages, and indemnity for damage, and upon the condition that the municipal government shall have the right to regulate the charges thereof." The only limitations upon this privilege are those contained in the language in which it is granted, viz., that the work shall be done "under the direction of the Superintendent of Streets, or other officer in control thereof," and "under such general regulations as the municipality may prescribe for damages and indemnity for damages." Upon a compliance with these conditions any individual or company duly incorporated for such purpose is given the privilege "of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes." The municipality may prescribe regulations "for damages and indemnity for damages," but these regulations must be "general," i. e., uniform in their application to all who may desire to exercise the privilege.

The designation of "damages and indemnity for damages" as the subject upon which the municipality may prescribe regulations in regard to laying the pipes is a limitation upon its authority over the matter, and a prohibition from prescribing regulations upon any other subject connected with the exercise of the privilege. When the sovereign authority of the state, either

in its constitution or through its legislature, has created a right and expressed and defined the conditions under which it may be enjoyed, it is not within the province of a municipality where such right is sought to be exercised or enjoyed, to impose additional burdens or terms as a condition to its exercise. The constitution does not authorize the municipality to require a permit as a condition upon which the pipes may be laid in its streets, and its claim of a right to require a permit includes the right to refuse one, and the right to annex one condition to the exercise of the privilege implies the right to annex others which may, at least, impair if not in fact amount to a denial of its exercise. The provision that the work is to be done under the direction of the Superintendent of Streets gives all the protection for the use of the streets that could be obtained under a permit; and, under the provision authorizing the municipality to prescribe regulations for damages and indemnity for damages, the city will be fully protected against any pecuniary loss or detriment. Under the statutes of New Jersey any telephone company was authorized to use the public roads and highways on the line of its route, for the purpose of erecting poles thereon to suspend its wires and other fixtures, upon first obtaining the consent of the owner of the soil, with the proviso that the use of the public streets in any incorporated cities and towns of the state should be subject to such regulations and restrictions as might be imposed by the corporate authorities of said cities and towns. The authorities of the township of Summit passed an ordinance that no wire should be stretched across any public street without the permission of the township committee. In an action to restrain a telephone company from stretching its wires across certain streets of the township the court held that this ordinance was not a "regulation or restriction" under the statute and was therefore, invalid, saying: "A right to prevent the use of

the streets for suspending wires, unless previous consent is obtained, if such right be lawfully conferred, authorizes a refusal to consent at discretion and confers a virtual power of prohibition. The right to the use of the streets has been expressly granted by the legislature, and the power to prohibit or interdict this use so granted cannot be inferred from the declaration in the proviso annexed to the grant, that the use should be subject to such regulations and restrictions as may be imposed. The restrictions intended in such a proviso must be held to be restrictions in the nature of regulations, and not restrictions which shall prohibit the use, or impose new conditions to the power to exercise the franchise." (*Township of Summit vs. N. Y. & N. J. Tel. Co.*, 57 N. J. Equity, 123.) A charter was granted to a gas company by the legislature of Georgia, in which it was authorized to use the streets of the City of Atlanta for laying its pipes and fixtures therein, with the proviso "that the public thoroughfares shall at no time be unnecessarily interrupted or impeded by the laying down or erection thereof, and that said streets shall not be thereby injured, but shall be left in as good state and condition as they were before the laying down of said pipes." The City of Atlanta having passed an ordinance requiring any person who desired to excavate any street for the purpose of laying gas pipes, or for any other purpose, to procure a written permission therefor from the City Engineer, under the penalty of fine and imprisonment, the gas company obtained an injunction against any interference with it on the part of the city authorities in laying the pipes in the streets, and the same was affirmed on appeal, the Supreme Court saying: "The permission of the City of Atlanta was not required to enable the complainant to exercise its franchise. It certainly was not made a condition by its charter. This was not the contract into which it entered with the state, and it would appear anomalous if

a subordinate power could impose terms which the superior did not see proper to impose." (*City of Atlanta vs. The Gate City Gaslight Co.*, 71 Ga. 106.) The same principal has been followed elsewhere. (*Michigan Telephone Company vs. City of Benton Harbor*, 121 Mich. 512; *Wisconsin Telephone Company vs. City of Oshkosh*, 62 Wis. 32; *Appeal of the City of Pittsburg*, 115 Pa. 4; *Borrough of Millvale vs. Evergreen Railway Co.*, 131 Pa. 1; *Harrisburg City R. R. Co. vs. City of Harrisburg*, 149 Pa. 465; *State vs. Flad*, 23 Mo. Ap. 185; *Hodges vs. Telegraph Co.*, 72 Miss. 910.) In *Borrough of Millvale vs. Evergreen Railway Co., supra*, the court said: "The power of the defendant in the exercise of its franchise is altogether independent of the Borrough, and is of just as high and authoritative origin as the right of the Borrough to exist at all. The rights of both are derived from the same source, to-wit: the legislative power of the commonwealth, and the company is not subject to the slightest obligation to go to the Borrough for consent to exercise any part of its corporate franchise. Any other doctrine would subordinate the corporate franchise of the defendant to the will of the Borrough council, and cannot be sanctioned for a moment."

The ordinance in question is not an exercise of the police power, nor can it be justified under that authority. The exercise by a municipality of the police power over its streets is limited to the protection of the public in their use of the street and does not include a limitation upon their use for any legitimate purpose. The highways of a state, including the streets in its cities, are under the control of the people of the state, and in this state the people have declared in their constitution that the streets of a city may be used for laying pipes therein for supplying its inhabitants with gaslight. Under the provision that the work shall be done "under the direction of the Superintendent of Streets"

ample protection is afforded to the inhabitants of the city against any unnecssary incroachment or hindrance in their use of the streets.

The suggestion on the part of the respondent that it is the purpose of the corporation herein to supply gas through its pipes for other purposes than light, even if founded upon fact, does not deprive it from exercising the right conferred upon it by the constitution, or authorize the municipality to prevent it from enjoying that right. Even though the pipes when laid may be available for other purposes than supplying gaslight, the corporation is not thereby deprived of the right which the constitution has given it to lay its pipes in the streets, nor can it be required as a condition of exercising that right to declare that the gas to be supplied by it shall be used exclusively for illumination, or is to be supplied solely for such use."

We have quoted thus at length from this opinion and far reaching decision of the Supreme Court of California because the full scope and effect of this provision of the Constitution of the State of California is thus given effect by the decision of that Court. But if the City of Los Angeles has within itself a power to prescribe a district in which it shall be unlawful to erect gas works, it has it within its power to so continue to limit that district until it shall say that within the City of Los Angeles there shall be no works erected or maintained for the manufacture of gas, and thus in effect nullify the grant given by the Constitution of the State of California that a person should have the right to use the streets for supplying gas, by destroying the implied right that follows therefrom to manufacture gas for the purpose of supplying the inhabitants of the municipality with the same.

If the City of Los Angeles has the power by thus prescribing the limits of a district in which no works shall be erected for the manufacture of gas, it must follow that other municipal corporations within the County of Los Angeles can do likewise, and also the Board of Supervisors, and thus make it impossible for any person to erect gas works within the County of Los Angeles, notwithstanding these provisions of the constitution of the State of California in reference to the use of the streets for the purpose of laying pipes therein. This cannot be done.

As was said in the case of *ex parte Johnston, supra,* "When the sovereign authority of a state either in its constitution or through its legislature has created a right, and expressed and defined the conditions under which it may be enjoyed, it is not within the province of a municipality where such right is sought to be exercised or enjoyed to impose additional burdens as a condition to its exercise * * * and the right to annex one condition to the exercise of the privilege implies a right to annex others which may at least impair, if not in fact amount to a denial of its exercise." The right to make restrictions must be held to be restrictions in the nature of regulations and not restrictions which shall prohibit the use or impose new conditions to the power to exercise the right.

It would be useless to have the right to lay pipes in the street without the power to erect works for the manufacture of gas with which, through such pipes, to supply the inhabitants of the city. The use of the streets would only be an exercise of a part of a corporate franchise and as was said in the case of *Millvale vs. Evergreen Railroad Company, supra,* "Any other doctrine would subordinate the corporate

franchise of the defendant to the will of the borrough council, and cannot be sanctioned for a moment."

The use of the streets is but an incident to the right to manufacture and distribute gas, and it cannot be said that the incident shall be greater than the whole. It is only a part of the entire enterprise which must have been contemplated by the framers of the Constitution.

We present this question to the consideration of this Court because we believe that under the provisions of the Constitution of the State of California, Section 19 of Article XI, there is an implied power granted to every person; an implied franchise constitutionally given to every person to erect gas works within cities and to construct and maintain them.

The power of introducing into and supplying the city with gas carries with it the implied power to construct within the city—not in some outlying district which cannot be connected with it—gas works for that purpose. Without this right the provisions of the Constitution as to supplying gas are rendered absolutely nugatory; for as the provision does not apply except to cities or like municipalities the attempt to exclude gas works from such cities destroys the right to supply gas under the constitutional franchise and of using the streets to supply the city and its inhabitants therewith.

This becomes very essential in the further consideration of this case because it has been contended on behalf of appellee that the Act of the Legislature of the State of California, approved April 4th, 1870, concerning gas companies, and which was adopted

prior to the adoption of the present constitution of that state is still in force. That act gives the corporate authorities of every city and town in the state of California power to "grant to any gas company the privilege of laying down pipes in the streets or alleys of such towns and cities * * * and supplying gas for the lighting of streets and buildings thereon." By section four, it was provided that the authorities of such town should attach "to every license or contract such conditions as will be for the benefit of the public and may secure their enforcement by any orders or ordinances which they may deem necessary. They may also control the location and construction of works so that they may be erected in suitable localities to give the least discomfort or annoyance to the public."

Statutes of California 1869-70, p. 815.

It was urged in the court below on behalf of appellee, that this statute is expressly continued in force by Political Code of the State of California, section nineteen, subdivision twenty, as follows:

"Nothing in either of the four codes affects any of the provisions of the following statutes, but such statutes are recognized as continuing in force, notwithstanding the provisions of the Codes, except so far as they have been repealed or affected by subsequent laws: * * * 20. An Act concerning gas companies, approved April 4th, 1870."

It was therefore urged on behalf of appellee that the Act of April 4th, 1870, is applicable to the present case. The Political Code of California was adopted by the legislature of the State of California and approved March 12th, 1872. Section nineteen

of article eleven of the Constitution of the State of California as now in force was ratified by the people of the State of California on the 12th day of February, 1885.

We contend that this Act of April 4th, 1879, is not in full force, for the reason that the Act itself and the Act continuing it in force were adopted for the purpose of giving to individuals and corporations the privilege of supplying a municipality with gas under conditions that might be prescribed by municipal authorities as to the use of the streets and thoroughfares thereof, and that the right to designate the place within said city limits where gas works should be erected was simply a condition annexed to the license; and that by the adoption by the people of the State of California of Section 19, Article XI of the Constitution of that State they by implication repealed the Act of the Legislature of April 4th, 1870, by themselves granting a franchise independent of the consent of the municipality. Under the present constitution the necessity of the provisions of that act as to securing the franchise from the municipality no longer exist, and the right of the municipality to impose as a condition of the grant the determination of the location of gas works has been abrogated.

By the people of the State of California in their Constitution giving to every individual or corporation organized for that purpose the use of the public streets for the purpose of laying down pipes and conduits therein for the purpose of supplying the municipality with gas, they impliedly repealed previous Acts of the Legislature covering and intended to cover the same

subject. In the Constitution there are no conditions to the grant. The people of the State of California by the adoption of the Constitution chose to take away from the municipality the power to grant or refuse permission to use the public streets with or without any condition whatsoever. [*Ex parte Johnston, supra, People v. Stephens,* 62 Cal. 209.] And the Constitution having given this right to use the public streets and thoroughfares of the municipality, it carried with it the implied right to any individual to erect and maintain gas works at any place within the limits of the municipality which the individual might select; and it is submitted that if the City Council have authority to pass a law limiting the district in which it shall be lawful to erect gas works, that by continuous limitation and exercise of that power they could abrogate and nullify this provision of the Constitution of that state.

The people of the State of California, with a law upon the statute books authorizing the municipality to grant the privilege to individuals to use the public thoroughfares for the purpose of supplying the cities with gas, coupled with the right to control the place of the location of the gas works, chose to take away from the municipality any voice in the matter, and by an absolute constitutional grant gave to every individual or corporation organized for that purpose the right to use the public streets without any condition whatsoever as to the place or places in which the gas works should be erected.

The ordinance is void in that it is unreasonable.

That the ordinance is unreasonable we desire to direct the attention of this court to the sweeping and prohibitory character of the ordinance in its attempted affect upon the right of citizens to make and store gas for useful purposes. The ordinance does not regulate the manner in which gas is to be manufactured, nor does it direct the method in which gas shall be stored, nor limit the amount of gas which shall be made or stored, but under its terms the making and storage of gas, except within the favored boundaries, must be absolutely stopped. The resident in the sparsely settled districts of the city, remote from the gas mains of the Los Angeles Lighting Company, is debarred from illuminating his house by means of any of the numerous gas-making machines which have been safely used for years, and which are now in use in many residences in the City of Los Angeles.

It is also unreasonable in that it describes the district by irregular and arbitrary boundaries for the sole purpose of protecting certain interests that are already established in said boundaries—those operated by the Los Angeles Lighting Company. By an examination of the ordinance of March 3rd, 1902, it will be observed that the boundary lines are drawn without any regard to any natural or geographical lines. While the eastern boundary line is the Los Angeles River, and the south boundary line the city limits of the City of Los Angeles, the western boundary line is an irregular line running through certain streets from the south boundary line of the City of Los Angeles to the

center line of San Fernando street, its principal object being to include and protect the existing works of the Los Angeles Lighting Company, and to leave out the works upon which the appellant was engaged in constructing.

The ordinance is unreasonable and too broad from the fact that it attempts to say that it is unlawful to erect gas works when there is no showing but what the gas works can be maintained in a most satisfactory condition, not only to the authorities, but to all the surrounding inhabitants.

If the ordinance abridges or violates the rights, privileges and immunities of appellant as a citizen of the United States to engage and conduct a lawful business of erecting gas works in the City of Los Angeles; if the ordinance is unreasonable in that it is too broad in its terms and does not regulate, but prohibits, the manufacture and storage of gas within the City of Los Angeles outside of the limits of the confined district described in the ordinance; if the ordinance is unreasonable in the description of the district in which it is sought to limit the right to erect gas works within the City of Los Angeles; if it is unreasonable on any other ground; if it is intended in its operation for the purpose of protecting only certain gas works and the destruction of all others; if it is beyond the power of the City Council to declare that a nuisance which is not a nuisance, then this ordinance, not being a proper police regulation, is invalid, and denies, as well as impairs, the exercise of fundamental rights of the appellant.

Appellant was fulfilling a lawful contract, the obli-

gation of which was impaired by the ordinance in question. Its employer had civil rights which had become vested under a legislative grant and authority, by the action of the City Council of the City of Los Angeles in the passage of the ordinance of August 26th, 1901, and by authority of the Board of Fire Commissioners to whom was delegated authority to grant the permit of November 22nd, 1901. Under this legislative authority appellant and its employer had expended large sums of money in the attempt to erect these gas works.

A city may estop itself by conduct, silence or acquiesence, like other parties to a contract. [*County of Randolph v. Post*, 93 U. S. 502, 513.]

"A grant in its own nature amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant." [*Fletcher v. Peck*, 6 Cranch, 87, 137.]

The city should be estopped by its own grants. Having once established a district and having invited the employer of appellant by virtue thereof to acquire certain property rights therein and having granted to her a permit to erect gas works, the city has no power to change the district in violation of those rights, unless it comes within some legitimate police power under a changed condition of affairs. We have demonstrated to this court that the ordinance of March 3rd, 1902, does not come within what is known as the police power, but on the contrary thereof, it is in violation of vested rights.

VII.

A COURT OF EQUITY HAS POWER TO RESTRAIN BY INJUNCTION A MUNICIPALITY FROM INSTITUTING CRIMINAL PROCEEDINGS WHEN SUCH PROSECUTIONS ARE THREATENED UNDER COLOR OF AN INVALID ORDINANCE FOR THE PURPOSE OF COMPELLING THE RELINQUISHMENT OF A PROPERTY RIGHT.

This question relates to the equity jurisdiction of the court.

We have demonstrated that the prosecutions instituted by the appellee, the City of Los Angeles, were under invalid ordinances and that the appellant had a vested right under its employer, Caroline W. Dobbins, acquired by legislative authority, on which it had expended large sums of money, which the appellee was endeavoring to coerce it into relinquishment of by prosecutions under these invalid ordinances.

It is alleged in the complaint that the appellee conducted these prosecutions under the guise of enforcing the invalid ordinances to which we have called this Court's attention, and that it threatened that if the appellant continued to carry on its work in which it was engaged in building the said gas works and manufactory for the manufacture of gas, that it would arrest all persons employed and engaged in said work until it should have stopped the construction of said gas works and compelled the appellant to desist from the erection thereof.

Under these circumstances, the remedy in equity was available and was the only complete remedy of the appellant.

While, as a general rule, equity will not interfere by injunction to restrain the prosecution of suits for violation of municipal ordinances, there are certain distinctions to be observed in applying this rule.

These distinctions and exceptions to the general rule are best illustrated by the cases to which we desire to call this Court's attention.

In the case of the *Central Trust Company v. Citizens' St. R. Co.*, 80 Fed. Rep. 225, was a motion before the Circuit Court of the United States for a preliminary injunction. The Citizens' Street Railway Company was organized under the general incorporation law of Indiana first enacted in 1861. By agreement with the City of Indianapolis, pursuant to certain ordinances in that behalf accepted by defendant railroad company, the rate of fare to be charged, could be five cents for each passenger, and such was the rate at the time the bill was filled. In March, 1897, the legislature passed an act in reference to the regulation of fares and made it a misdemeanor for any company not to comply therewith.

The question as to the validity of this statute as impairing the contract rights of the defendant railroad company and of the court to entertain the bill to enjoin the district attorney from instituting prosecutions under the act was involved. Showalter, Circuit Judge, said:

"Counsel urge that this bill does not show a cause of action cognizable in chancery against Mr. Wiltsie,

the district attorney, since its purpose is to restrain him from instituting criminal prosecutions under color of the amendment of 1897. *But this complainant is seeking to protect a property right, and it seems to be law that, when such prosecutions are threatened under color of an invalid statute for the purpose of compelling the relinquishment of a property right, the remedy in chancery is available.* *Reagan v. Trust Co.*, 154 U. S. 326, 14 Sup. Ct. 1047, and *Lottery Co. v. Fitzpatrick*, 3 Woods, 222, Fed. Cas., No. 8,541, in each of which apprehended criminal prosecutions were enjoined, are to the point. Even in the case of *Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, cited by the attorney general, the rule as here stated is plainly recognized; nor do I find it disputed in any case."

The case of *Central Trust Co. v. Citizens' St. Ry. Co. et al., supra,* was again before the Circuit Court upon a motion to dissolve the injunction, and is reported in 82 Fed. Rep. 1, and it was again held by Judge Showalter that if the Act of 1897 was invalid, then Mr. Wiltsie, the prosecuting attorney, did, in attempting to enforce the provisions of the Act, not represent anything, and could be merely a wrong doer. The question primarily before the court must be—Was the act valid?

The court again cites with approval as applicable to the question as to the rights of the district attorney, the case of *Reagan v. Trust Co.*, 154 U. S. 362.

This suit involved the validity of the rates fixed by the railroad commissioners of the State of Texas and upon the bill in equity filed in the Circuit Court of the United States, the defendant company was enjoined from adopting the rates, the attorney general from instituting or prosecuting any suit to collect any penalty by reason of the failure of the company to adopt such

rate, and the members of the board from any such action, by them, as would have been appropriate in aid of prosecutions by the attorney general.

In this respect the decree of the Circuit Court was affirmed. The questions involving jurisdiction are considered in 154 U. S. 388-393. Of this case, Circuit Judge Showalter, in *Central Trust Co. v. Citizens' Street Ry. Co.*, 82 Fed. 1, says:

"As the case stood, and assuming the invalidity of said sections, he (the attorney general) represented nothing. His prosecutions would simply have been gross wrongs, under color of void legislative enactments. The opinion last cited was delivered in May, 1894. The position of Mr. Wiltsie here is the same as that of the attorney general in the Reagan case. If the attorney general had not been specifically named as the officer to carry on the prosecutions under the Texas statute, that duty would have devolved upon some prosecuting attorney in Texas, and such officer, in place of the attorney general, would have been the defendant. I cannot hold that this suit, as against Mr. Wiltsie, is inhibited by the eleventh amendment, without diregarding the law as laid down by the Supreme Court of the United States. If, in the Reagan Case, sections 5 and 14 had been deemed valid, the injunction could not have issued or been sustained. Here the injunction is the purpose of the bill. If, as said, the enactment of 1897 be valid, the case fails, and the bill must be dismissed as to all defendants. If that enactment be invalid, Mr. Wiltsie, so far as the threatened prosecutions are concerned, does not represent the state in any capacity whatever."

In the case of *Southern Express Co. v. Mayor of Ensley*, 116 Fed. Rep. 756, Judge Jones, in delivering the opinion of the court (p. 759) said:

"The necessities of this case do not require much discussion of the power of a court of equity to stay or enjoin criminal prosecutions. It is to be borne in

mind that the power of the state, much less of its municipal authorities, cannot extend to regulating interstate commerce. A license imposed for revenue is the exercise of the taxing, not the police, power, and prosecutions before the corporate tribunal for doing the business without a license are *quasi* penal only, at most. In substance and legal effect, they are civil proceedings. *Royal v. Virginia,* 116 U. S. 583. The 'offense' is not a crime. The 'offense' does not violate any law for the preservation of the health, morals, liberty, or peace of the citizens of Ensley. Enjoining prosecutions of the 'offense' here, if there is any law to support it, does not in any wise interfere with the control of the local tribunals over the mass of governmental powers committed to them for the welfare of the people of Ensley under what, for want of a better name, we denominate the police power. It is about prosecutions for offenses under ordinances directed solely to that end that many of the authorities are strict in holding that courts of equity must not interfere. Some of the authorities make this distinction the test, and unhesitatingly interfere, in cases of hardships, against prosecutions, even under valid ordinances, where the matter insisted upon by the municipal authorities relates to the enforcement of its business or corporate rights, or private rights, as distinguished from ordinances exerting the police power to protect the lives, health, peace, and morals of the citizens. Other courts, whenever property rights are involved, grant or refuse injunctions against the enforcement of municipal ordinances, although violations of them are punished by penal proceedings, on the same principles on which they are granted or refused as to private individuals.

"The reason of the rule forbidding a court of equity to stay criminal proceedings can never apply in any degree to any prosecution in the criminal courts, unless the crime or offense for which the offender is prosecuted is created by some valid law or ordinance, or by laws or ordinances whose invalidity is doubtful and has not been pronounced by the courts of final resort. There is no crime here. There is no law which makes the failure to pay the license an offense. There

is no law which authorizes any tribunal to fine and imprison complainant or its agent for refusing to pay the license tax. Every arrest under this ordinance is a lawless and forcible trespass. When a court of equity restrains a trespasser from coercing submission to a lawless demand, by prosecutions for alleged crimes before courts which have no jurisdiction to try the accusation, because the law neither makes such a crime, nor authorizes any court to inquire into or to punish it, the jurisdiction of no tribunal is invaded, and 'criminal proceedings,' are not stayed in any moral or legal sense. The right and duty to intervene against such acts are in no wise affected by the so-called 'criminal' feature, but depend entirely upon the equities of the particular case. There is nothing inconsistent with these views in the decisions *in re Sawyer*, 124 U. S. 200, and in *Harkrader v. Wadley*, 172 U. S. 148. *In re Sawyer* related to removals from office, with which we are not here concerned. In the other case it is said: 'It is not contended here that the State statute under which the county court of Wythe was proceeding was repugnant to the constitution or any law of the United States, or that the state did not have jurisdiction of the offenses charged or of the person of the accused.' That case and this differ widely. There it was sought to enjoin the prosecution by state officers of an indictment for a felony found under valid laws of the state, and the injunction was really directed against the state itself. *In re Ayers*, 123 U. S. 433. * * *

"The ordinance here in question is a palpable violation of the constitution. If the municipal authorities who are engaged in enforcing this ordinance are otherwise amenable to preventive remedies of a court of equity, upon what principle of law or morals can they evade the jurisdiction, because to the usurpation of power in passing the ordinance is added the further defiance of the constitution, by declaring resistance to the ordinance a penal offense against society, and punishing it accordingly? The fact that the city officers in making the arrests were themselves trespassers, and violators of the law of the land, using the physical power of the city to effect these arrests, can in no way

affect the jurisdiction of this court, if a case is otherwise made out which justifies injunctive relief against them. *Osborn v. Bank*, 9 Wheat. 738; *Davis v. Gray*, 16 Wall. 203; *In re Debs*, 158 U. S. 564; *City Council of Montgomery v. Louisville & N. R. Co.*, 84 Ala. 130, 4 South. 626; *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala. 116, 4 South. 106.

"The case made by the bill presents strong claims for equitable interference. Municipal authorities prescribe regulations for interstate commerce in violation of the law of the land, and attempt to intimidate and coerce those engaged in it to submit to their lawless exactions by arrests and threats of fine and imprisonment. They have already twice arrested defendant's agent, and solemnly avow a purpose to arrest and fine or imprison him daily until he succumbs to the lawless exactions of the city. The citizen thus oppressed and sought to be intimidated is engaged in interstate commerce. It is a common carrier also, possessed of corporate franchises, in whose orderly exercise citizens of this and other states have an interest. Its business would be ruined by the constant recurrence of these daily arrests having for their unlawful object the destruction of the business, unless those engineering the repeated trespasses are permitted to regulate interstate commerce. The constitutional right of the citizen to engage in interstate commerce cannot have full vigor and effect if the citizen cannot enforce his rights to carry on such business in the first instance by the speediest and most effective mode known to the law. The courts of the United States should not be astute to find technical reasons for denying the affirmative enforcement of such a right on the theory that the wrong would not be irreparable, if the money lawlessly exacted as a commutation for the right which the constitution gives without price can finally be recovered back from the wrongdoer. Compelling the citizen thus wronged to first pay the unlawful exaction, and then sue for damages or to recover the money, puts the constitution in abeyance for the time being and forces the citizen temporarily to submit to the wrong as a condition precedent to enforcing the constitution.

However proper such a view may be as regards ordinary trespasses to mere property rights, it seems out of place in dealing with the forcible denial of a fundamental constitutional right. The remedy at law in such a case does not seem 'as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.' *Boyce v. Grundy*, 3 Pet. 214. Be this as it may, it is settled that a court of equity should enjoin the enforcement of a municipal ordinance, though violations of it are punished criminally, when its enforcement will effect the illegal destruction of, or a grave interference with, a corporate franchise, in the operation of which the public have an interest. *City Council of Montgomery v. Louisville & N. R. Co.*, 84 Ala. 130, 4 South. 626; *Mayor, etc., v. Rodgers*, 10 Ala. 47; 2 Dill. Mun. Corp. Sec. 908. See, also, *Street Railway Cases*, 70 Ala. 465, 58 Am. Rep. 615; *Quintinni v. City of Bay St. Louis*, 64 Miss. 483, 1 South, 625, 60 Am. Rep. 62; *Lottery Co. v. Fitzpatrick*, 3 Woods, 222, Fed. Cas. No. 8, 541; *City of Atlanta v. Gate City Gaslight Co.*, 71 Ga. 107; *Third Ave. R. Co. v. Mayor, etc., of New York*, 54 N. Y. 159; *Milling Co. v. Lee* (Colo. App.), 29 Pac. 1037; *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala. 116, 4 South. 106. If 'courts of equity did not interfere in cases of this sort, there would be a great failure of justice in this country.' 2 Story, Eq. Jur. Sec. 928."

In the case of *Lottery Co. v. Fitzpatrick*, 3 Woods 222, Fed. Cases No. 8541, was a motion for an injunction *pendente lite* and it was held while Courts of Chancery do not deal with matters of crime, nor questions of mere morality, (p. 261) "*there is this reservation, that it is only when those matters are not connected with the rights of property of which the court has jurisdiction,*" citing *Springhead Spinning Company v. Riley* (L. R.) 6 Eq., 588.

This is not limited to property over which the court of equity for some other reason has

already acquired jurisdiction, for the vice-chancellor, in that case, says:

"The jurisdiction of this court is to protect property, and it willinterfere by injunction to stay any proceedings whetler connected with crime or not, which go to the immediate or tend to the ultimate destruction of property, or to make it less valuable for use or occupation."

The Circuit Court in *Lottery Co. v. Fitzpatrick, supra*, then cites with approval *Osborn v. United States Bank*, 3 Wheaton, 738, and says:

"The officers of every state of the United States, whether executive or judicial, owe to the Constitution of the Unted States a fealty, an homage, an obedience surpassing that which they owe to their constituents of the state. The people of the United States, composed of all thepeople of the separate states have adopted the constitution, and have ordained that the terms of that instrument and the laws and treaties made pursuant to it, shall have obedience, anything in the constitution or laws of any state to the contrary notwithstanding: *Gibbons v. Ogden*, 9 Wheat. 1; *Dolge v. Woolsey*, 18 How., 331.

"The supremacy of this constitution, from the very frame ofthe government, in cases like this before the court, must be maintained by the courts of the United States. The judicial power was organized so that controversies arising under the constitution and laws, which asumed a judicial form, should, in some cases, originally, and in all cases, finally be determined in the courts ofthe United States, in order that in every state the consitution and laws should be understood and obeyed in the same manner: *McCulloch v. Maryland*, 4 Wheat, 316; *Ableman v. Booth*, 21 How., 506. * *

"The power of a court of chancery to restrain persons subject to the jurisdiction of the court, and parties to a cause pending before it from taking proceedings in other courts, whether domestic or foreign, to defeat the endsof such proceedings is indisputable. * * *

"But when the state itself errs and its legislature visits bya law, constantly recurring penalties upon all

the officers and agents of a corporation, it gives rise to a question of the rightfulness of the law, viewed in its operation upon franchises—upon property. For, since a corporation is an artificial being, and can only act through its representatives, any law which forbids, under penal sanctions, every conceivable corporate act of such officers and agents, must assail the value and existence of its privileges, and if that law be unauthorized, its operation may be restrained and the property, which is by the constitution exempted from its power, may be protected by the proper process of the courts: *Wood v. City of Brooklyn*, 14 Barb., 425; *Frezin v. Lewis*, 4 Myl. & Cr., 249.

"The states may define crime, affix penalties, arraign and punish those who commit the prohibited acts. Where there is no right of property involved, the Circuit Courts have no jurisdiction to deal at all with any criminal process of a state, however void may be the law from which it emanates. Such case can be submitted to the constitutional tests only by being brought from the state court of last resort before the Supreme Court of the United States. *But in a case which, as does this, involves the right of property, in which an invasion of those rights is sought to be affected through process based upon a law of a state, void, because unconstitutional,* it makes no difference whether the void law is found in a criminal or civil code, or whether the process which is sought to be made the instrument of injury bears the seal of a police magistrate or the signature of a state auditor? Both are void because resting upon a prohibited and void law of a state."

The case of *Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575; 15 L. R. A. 321, was an action to enjoin defendants from enforcing a city ordinance against plaintiff's agents for the violation of such ordinance.

The appellant, the City of Rushville, by ordinance granted to the appellee the right to use the streets, etc., of the city for the purpose of laying pipes and doing the

necessary work in connection therewith in putting in a natural gas plant. The appellee accepted the franchise granted by the ordinance and expended large sums in carrying out its project. Afterwards the city enacted another ordinance, fixing the conditions under which a corporation could use the streets, etc., for the introduction of natural gas and imposing additional conditions and restrictions upon those acting under it, with penalties for its violation.

The court said:

"The appellant contends, however, that even if this is true the appellee was not entitled to relief by injunction. This question has been decided adversely to the appellant by the recent case of *Davis v. Fasig*, 128 Ind. 271, where it was held, following numerous authorities, that a court of equity may enjoin the enforcement of a city ordinance to prevent a multiplicity of actions.

"The ordinance being void as to the appellee in a most material provision, which absolutely denied to it substantial rights except on condition that it submit to unjust restricions, it had the right to go into a court of equity and have its enforcements stayed by injunction."

In the case of *Davis v. Fasig*, 128 Ind. 271; 27 N. E. Rep. 726, 737, cited in the foregoing opinion in *Rushville v. Rushville Natural Gas Co., supra.*, the court said:

"We cannot agree with counsel that a court of equity may not in a proper case, enjoin the enforcement of city ordinances to prevent a multiplicity of actions. It has been held that where an ordinance is void, any party whose interests are to be injuriously affected thereby may go into a court of equity, and have its enforcement stayed by injunction. *Mayor, etc., v. Radecke*, 49 Md. 217."

The case of *Platte & D. Canal & Milling Co. v. Lee, Mayor, et al.*, (Colo.) 29 Pacific Rep. 1036, was an action brought to determine the validity of certain ordinances adopted by the City of Denver directing a change in the construction of the ditches of plaintiff. It was held that the ordinances were invalid as affecting the complainant company, and it became necessary to determine whether a court of chancery has power to pass upon the validity of the ordinances, and enjoin the city and its authorities from prosecuting the plaintiff for a violation thereof. The court said: (p. 1039) "This brings us to the consideration of the second question: Can the court enjoin the defendants from prosecuting the complainant company for violation of the ordinances? It may be admitted that equity would not enjoin the action of municipal corporations while proceeding within the limits of their well-defined powers as fixed by law; yet it is claimed that it has undoubted jurisdiction to restrain them from acting in excess of their authority, and from the commission of acts which are *ultra vires*. High, Inj. Sec. 241. *It is a well-recognized principle that courts of equity will grant an injunction to protect a party against a multiplicity of suits.* Under the ordinance in question, as before stated, the representatives of the complainant company would be subjected daily to arrest for a failure to comply with the order of the Mayor; and should they successfully present their defense in such a proceeding, it does not follow that they would not be continuously harrassed by repeated arrests for the violation of ordinances which we have herein declared invalid. And pending the final determination of the validity of this ordinance or the completeness of the defense, innumerable actions might be commenced against them, thus subjecting them to great expense, inconvenience and embarrassment. In the case of *Smith v. Bangs*, 15 Ill. 399, Treat, C. J., lays down the following doctrine: 'A court of equity will interfere by injunction where public officers, under claim of

right, are proceeding illegally to impair the rights or injure the property of individuals or corporations, or where it is necessary to prevent a multiplicity of suits.' Where a municipal corporation is seeking to enforce an ordinance which is void, a court of equity has jurisdiction, at the suit of any person who is injuriously affected thereby, to stay its execution by injunction. *Mayor of Baltimore v. Radecke*, 49 Md. 218. We do not look upon this proceeding on the part of the city to impose a penalty for the violation of the ordinance as coming within the scope of the authorities holding that equity will not interfere by injunction to prevent criminal prosecution for violation of illegal ordinances or statutes, but rather incline to the belief that the imposition of a penalty is for the purpose of compelling the complainant to comply with the ordinance by reducing the width of the ditches, and to protect the banks of such ditches. It is true that the ordinance imposed a fine for disobedience of the order after ten days' notice, but nevertheless this must be considered in conjunction with section 10, which seeks to impose duties upon the complainant company wholly unwarranted, and which clearly infringes upon the vested rights of the company. In the case of *Cape May & S. L. R. Co. v. City of Cape May*, 35 N. J. Eq. 409, this language is used: 'Whatever doubts may have before existed respecting the power of the courts to control the acts of the municipal corporations, they seem now to be at rest, and the line defining in what cases they may intervene, and in what they should not, seems to be marked distinctly and with precision.' The rule upon this subject is stated with perspicuity by Judge Dillon, as follows: 'There can, ordinarily, be no judicial restrain or interference with the *bona fide* exercise of powers, legislative or discretionary in their nature, and which does not violate private rights.' Dill Mun. Corp. (2d Ed.) 908. Chancellor Zabriskie, in speaking upon the same topic, says: 'All legislative acts, or exercise of discretionary powers, within their authority, are beyond the control of the courts, however, unwise or impolitic, or even when done from corrupt motives, or for unworthy purposes. Their legislative powers

are, when exercised within their authority, supreme. But when the corporation have fulfilled their legislative functions, and have exercised their legislative discretion, and are about carrying their legislation into execution, then, if the effect of their acts is to violate vested rights or inflict irreparable wrong, the courts may properly intervene.

There is no difficulty whatever in applying this rule to the case in hand. It falls, indeed, directly within it. The provisions of ordinance No. 10 is aimed specifically at complainant in this case. It seeks to compel it to do certain acts which, from the very nature of things, violate vested rights, which have received recognition in the Supreme Court of this state. *City of Denver v. Mullen, supra.* 'The question of the degree of interest in the subject-matter which is requisite to render one a proper party plaintiff to institute an action for the purpose of restraining misconduct on the part of municipal corporations or their officers, is one of much practical importance, and deserving of special attention. In general, it may be said that, to warrant the interference of equity in this class of cases, the aggrieved party must show that some special and peculiar injury, personal to himself, is likely to result from the act complained of, aside from the general injury to the public.' High. Inj. Sec. 1298. What, then, is the situation of the parties to this proceeding? The company insist that they have acquired by virtue of their location and construction of this ditch, and by virtue of legislative authority, vested rights as against the city and its inhabitants. The Supreme Court of this state, in three different decisions, have upheld this assertion. The City of Denver by a general ordinance applicable to corporations of a similar nature, to be created, and those already in existence, have provided by ordinance that such corporations shall keep their ditches in good repair whenever so required to do, and all such ditches, flumes, bridges and crossings shall be located, constructed, and built under the supervision of the city, or some officer of said city duly authorized to superintend the same. And that the City Council shall have the right and power to order, from time to time, changes in

the location and construction of the same, as in their opinion the public welfare and safety require. And, further, that every person or corporation who shall fail or refuse to comply with the requirements of the ordinance, or to obey any order of the city in reference to the same, after ten days' notice, shall be fined, etc. To make this provision of the ordinance effective as against complainant company, they passed what has been denominated this 'Ordinance No. 10,' and made it applicable to the complainant company only, and insist by this subsequent ordinance that the channels of the ditches shall be confined within certain limits to carry water, and provide that, if such things are not done, then, in conformity with the provisions of section 4, the person or corporation shall be daily prosecuted, and fined for failure so to do. If this does not tend to impair vested rights, and is not calculated to inflict irreparable wrong without authority in law, then we are unable to appreciate the full force and effect of the English language. True, it may be said with some force that the ordinance imposed a penalty for failure to comply with its provisions, but such failure to so comply is not classified as a misdemeanor or a crime, but the penalty is imposed because the complainant company refused to surrender their acquired and well-recognized rights. It is the public corporation that is affected, and not the public. It is the corporation that is liable to have continually imposed upon them fines, and to be continually harrassed by legal proceedings. We think that this is a case that peculiarly addressed itself to a court of equity, and that the court erred in sustaining the demurer to the complaint. The judgment must be reversed, and the case remanded."

In the case of *Los Angeles City Water Co. v. City of Los Angeles*, 103 Fed. Rep. 711, it was held that the Circuit Court had jurisdiction of a suit by a water company to enjoin the enforcement of a municipal ordinance fixing rates of charge for water, on the ground that it impaired the obligation of the contract between

the city and the company, and that equity would restrain the city from enforcing its ordinance reducing rates of charge in impairment of the contract and in subjecting the company and its officers and employes to penal actions for its violation, and also to restrain private persons from instituting threatened prosecutions under such ordinance.

In this case Judge Ross said (p. 738):

"If the ordinance be void, and the defendant city, notwithstanding, threatens to, and unless restrained by the court, will proceed to enforce its penal provisions, including those contained in it and in the constitution and statute of California, for the forfeiture to the city of the water works in question should the complainant charge other rates than those therein prescribed, and otherwise dispossess the complainant of the property, nothing can be plainer than that a court of equity ought to restrain the city, and its power to do so is quite as clear. *Iron Mountain R. Co. v. City of Memphis,* 35 C. C. A. 410, 96 Fed. 113; *Southwest Missouri Light Co. v. City of Joplin* (C. C.) 101 Fed. 23. And if, as is alleged, certain of the water consumers, acting under such statutory provisions and under the same provisions of the ordinance in question, threaten to, and will, unless restrained, commence similar suits for the forfeiture of the works to the city, *and criminal suits against the complaint and those acting for it, as provided in the ordinance,* ought not a court of equity to restrain them also? Undoubtedly so. It is only by such means that the rights of the complainant under the contract can be protected. See decree in *National Water Works Co. v. Kansas City,* 10 C. C. A. 653, 62 Fed. 853, 867; *Singer Sewing Mach. Co. v. Union Buttonhole & Embroidery Co.,* 22 Fed. Cas. 222 (No. 12,904); Wat. Spec. Perf. Cont. Sec. 109; 1 Beach, Inj. Sec. 444."

In the case of the *City of Atlanta v. Gate City Gaslight Company,* 71 Georgia 196, the Supreme Court of Georgia said:

"That injunction was the proper remedy to restrain the defendants from interfering with and hindering the prosecution of the complainant's work under its charter, is evident, both upon principle and authority. While a court of equity will not interfere by an injunction with the prosecution of a criminal proceeding [53 Ga.,677,(4);61 *Ib.*,386;68 *Ib.*,64], yet, where it is evident that private property and civil rights are invaded by such means, equity will interfere to protect them. 'If the charge be of a criminal nature, or offense against the public, and does not touch the enjoyment of property, then a court of equity should not interpose by injunction.' On the other hand, where it is manifest, as in this case, *that a prosecution and arrest is threatened for an alleged violation of city ordinances for the sole purpose of preventing the exercise of civil rights conferred directly by law, injunction is a proper remedy to prevent injury to the party thus menaced.* 55 Ga. R., 601 (5), 619; 50 *Id.* 451.

"'A court of equity,' says Kerr (Injunctions 2),'has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right of property. If a charge be of a criminal nature, or of an offense against the public peace, and does not touch the enjoyment of property, jurisdiction cannot be entertained. * * * But if an act which is also criminal touches also the enjoyment of property, the court has jurisdiction, but its interference is founded solely on the ground of injury to property.' Many cases and elementary writers might be cited to sustain the distinction here laid down."

In the *City of Austin v. Austin City Cemetery Ass'n*, 28 S. W. Rep. 528, the Supreme Court of Texas said:

"We are of the opinion that, if the ordinance in controversy be void, the appellee is entitled to restrain its enforcement by the writ of injunction. It is not to be contraverted that, as a general rule, the aid of a court of equity cannot be invoked to enjoin criminal prosecutions. This rule is, however, subordinate to the general principle that ***equity will grant relief when there is not a plain, adequate, and complete remedy at***

law; and, when it is necessary to prevent an irreparable injury. Courts of criminal jurisdiction have power to enforce an observance of statutes against crime by visiting upon offenders the penalties affixed for their infraction, and ordinarily no one can call to his aid the powers of a court of equity in order to enforce their observance. Yet it has been held that 'the court will interfere to prevent acts amounting to crime, if they do not stop at crime, but also go to the destruction or deterioration of the value of the property.' *Spinning Co. v. Riley*, L. R. 6 Eq. 551. This, however does not assist us materially in the solution of the present question. It would seem clear that if a party could be enjoined from doing an act, not criminal in its nature, which is injurious to the property of another, he could also be enjoined if the act be one made punishable by law as a crime. The punishment of the criminal, when the act committed has injuriously affected the value of the property of another, does not repair the injury. The question under consideration arises upon quite a different case. Here the appellee seeks to enjoin the city of Austin from enforcing an ordinance which it claims to be void, and says that, if the enforcement be not restrained, it will result in an irreparable injury. In behalf of the city it is answered that, if the ordinance be invalid, there exists a plain, adequate, and complete remedy at law. It is true that, if the ordinance be void, any one prosecuted under its provisions may have it so declared, either in the original criminal action, or by suing out a writ of *habeas corpus*. Notwithstanding this fact,it is clear to us,without the statement of the conclusion by the court of civil appeals, that the effect of the ordinance is such that, if its enforcement be not restrained, it may result in a total destruction of the value of appellee's property for the purpose for which it was acquired." * * *

"Suppose a city, not having the power under its charter to do so, should pass an ordinance prohibiting the sale of butchers' meat in a certain locality, and suppose it should also prohibit any one from selling meat to be there sold, or from buying it in the prohibited place. The ordinance would be void; but could any

one say that the business of a market man in the locality might not be effectually destroyed by it? Under such circumstances, we are of opinion that he should have the right to proceed against the corporation to enjoin its enforcement. If a penalty was denounced against no one but the market man who should sell, it would seem that his remedy would be to proceed with his business, and defeat any prosecution that should be brought against him for the infraction of the void ordinance. But to deny a remedy in a court of equity in the case first supposed, or in the present case, analagous to it, would be, we think, to disregard the fundamental principle upon which such courts are established."

The case of *Port Mobile v. Louisville & N. Railway Co.*, 4 So. Rep. 106 (Ala.) was a case brought by the Louisville & Nashville Railway Company against the Port of Mobile to enjoin the enforcement of certain ordinances of that municipality which were alleged to be in violation of the charter of the plaintiff corporation. It was contended that a court of equity did not have jurisdiction because in the ordinances, the enforcement of which it was sought to enjoin, it was provided under a penalty it should be prosecuted for each violation of the ordinance. The Supreme Court of Alabama said: (p. 110)

"The jurisdiction of a court of equity to protect a franchise of this kind from unlawful invasion or disturbance is clearly settled, and has been often recognized by this court as benign and salutary. The value of such a right, or the cost of its unlawful disturbance, cannot be reduced to a pecuniary measure. When the purpose is its utter destruction, the duty to protect becomes correspondingly more urgent and imperative. The ground of its exercise is usually the prevention of irreparable injury, or such as cannot be adequately estimated in damages

at law; at other times, the avoidance of a multiplicity of suits, and again the abatement of annoyance in the nature of a legal nuisance. Another controlling reason for interference by equity in such cases is that the public at large have an interest in the protection of such a privilege, as well as the parties partly interested. [*Stage Co. v. Society*, 15 Abb. Pr. (N. S.) 51]. The party aggrieved is not required to establish his right at law, before he is permitted to evoke the aid of equity, if such right is clear and free from doubt. The verdict of a jury is only necessary where the right claimed is doubtful. The right is here determined by a municipal ordinance in the nature of both a grant and a contract, which is in writing. Its construction is for the court, and not for the jury. *Mayor v. Rodgers*, 10 Ala. 37; *Turnpike v. Ryder*, 1 Johns. Ch. 611; *Harrell v. Ellsworth*, 17 Ala. 576; *Turnpike v. Miller*, 9 Amer. Dec. 274; *Com. v. Railroad Co.*, 24 Pa. St. 159, 62 Amer. Dec. 372; *Attorney General v. Heishon*, 18 N. J. Eq. 410, 2 Dill. Mun. Corp. Sec. 907.

"It is too clear for argument that it is no objection to the exercise of this jurisdiction that the attempted invasion of the franchise sought to be protected is accompanied by acts which are personal trespasses. A court of equity will not, it is true, interfere to enjoin a mere trespass of an ordinary character either upon the person or property. The remedies afforded at law are deemed adequate in cases of this kind. *Railroad Co. v. Walton*, 14 Ala. 207. But the cases are numerous in which the arm of this court has been successfully invoked to enjoin trespasses, which, if unrestrained, would probably result in irreparable mischief, or where such mischief might be completely effected before a trial at law could be had as to the controverted right. Judge Story thus states the rule: 'If the trespass be fugitive and temporary, and adequate compensation can be obtained in an action at law, there is no ground to justify the interposition of courts of equity. Formerly, indeed, they were extremely reluctant to interfere at all, even in regard to repeated trespasses. But now there is not the slightest hesitation if the acts done, or threatened to be done, to the

property would be ruinous or irreparable, or would impair the just enjoyment of the property in the future. If, indeed,' he concludes, 'courts of equity did not interfere in cases of this sort, there would be a great failure of justice in the country.' 2 Story, Eq. Jur. Sec. 928. The chancery court of England had come up to this advanced view of the law as early as the days of Lord Hardwicke. *Coulson v. White*, 3 Atk. 21. And this view is now supported by an unbroken array of uniform authorities, speaking with one voice on the subject. *Jerome v. Ross*, 7 Johns Ch. 315, 11 Amer. Dec. 484, note, 498-507; *Lyon v. Hunt*, 11 Ala. 295, 46 Amer. Dec. 216; *Scudder v. Falls Co.*, 23 Amer. Dec. 756; *Poindexter v. Henderson*, 12 Amer. Dec. 550; *Burnley v. Cool*, 13 Tex. 586, 65 Amer. Dec. 79; *White v. Flannigain*, 1 Md. 525, 54 Amer. Dec. 668. The case of *Osborn v. Bank*, 9 Wheat. 738, is a familiar and high authority, from one of the greatest of judges, for the position that where a trespass, or a series of trespasses, operate, in effect, to destroy or seriously impair the exercise of a franchise, a court of equity will not hesitate to interpose to prevent the apprehended injury by the aid of injunction. And in *Stage Co. v. Society*, 15 Abb. Pr. (N. S.) 51, it is expressly held that an injunction would lie to restrain the persistent commission of trespasses of a mere personal nature, where they affect a corporate franchise. And the same principle has been recognized by this court in a case where it was sought to enjoin the enforcement of a municipal ordinance, the violation of which was attended with a penalty. *Moses v. Mayor*, 52 Ala. 198. The equity of the present bill can be supported upon the ground that the court will lend its aid to prevent the destruction or serious impairment of a vested franchise, the value of which cannot be adequately estimated in damages. The case is strengthened by the further consideration of preventing expensive and vexatious litigation accompanied by a multiplicity of suits, and the insolvency of the defendants, by whom the alleged grievances are threatened,—facts which strongly corroborate the alleged inadequacy of any legal remedy open to the com-

plainant in the courts of law. The records of our courts present few cases of threatened injury so irreparable in nature, or for which a verdict of damages at law would furnish so inadequate compensation. *Jerome v. Ross*, 7 Johns Ch. 11 Amer. Dec. 484, note, 500-507.

"The suggestion that the court, under peculiar circumstances of this case, must abdicate this jurisdiction because of the fact that it is dealing with an ordinance of a municipal corporation of a quasi criminal character, the violation of which is made an offense, does not strike us favorably. The power to prevent irreparable injury flowing from the deficiencies and injustice of the more technical rules of the common law, may be said to be the very life of equity jurisdiction. The court must, therefore, be jealous of its preservation, notwithstanding it may also be cautious in its exercise. Municipal corporations can claim no exemption from being subject to it. They must stand in our courts upon terms of equality with all other corporations and with natural persons. Our constitution declares that 'all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons.' Const. 1875, Art. 14, Sec. 12. 'The legal effect of this provision is to place municipal corporations, as nearly as practicable, upon a basis of equality in the enforcement and defense of their rights in courts of justice in this state.' *Railroad Co. v. Mirris*, 65 Ala. 193; *Davis v. Mayor*, 1 Duer, 452. And the rule, accordingly, must apply with peculiar force with us, which is said by Mr. Dillon to be generally recognized elsewhere, that 'equity will interfere in favor of or against municipal corporations on the same principles by which it is guided in other cases.' 2 Dill. Mun. Corp. Sec. 908. *It cannot be tolerated that municipal corporations in view of these principles, should escape the grasp of a court of chancery, in a clear case of equitable cognizance, by the device of adding a penalty to an illegal ordinance, which is designed as a repudiation of its own valid grants or contracts*, especially in a case where the public are largely concerned, and a court of law can afford no remedy adequate for the prevention of irreparable

injury that would probably result from the enforcement of such ordinance. There is nothing in the case of *Burnett v. Craig*, 30 Ala., 135, 68 Amer. Dec. 115, which is in conflict with the foregoing views, as will appear from the later case of *Moses v. Mayor*, 52. Ala. 198. *The mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable injury which will result from the failure or inability of a court of law to redress such rights.* 1 High, Inj. Sec. 20; *Mayor v. Radecke*, 49 Md. 217, 33 Amer. Rep. 230; *Railroad Co. v. New York*, 54 N. Y. 159; *Mayor v. Waring*, 41 Ala. 139."

The proposition for which we are contending is in direct conflict, and hence this appeal, with the opinion rendered by the learned judge sitting in the Circuit Court in this case, when he denied the motion for an injunction and dismissed the bill for want of equity, holding, as in the opinion appearing in the record, that courts of equity were without jurisdiction to enjoin criminal prosecutions under a statute or ordinance alleged to be unconstitutional, even though it is also alleged that it is the purpose of such prosecutions to injure complainant in its property rights, and such will be their effect.

With great respect to the learned judge of the court below, who rendered this opinion, we here maintain that that opinion is against the great weight of the authorities to which we have already called this Court's attention and contrary to the spirit of the decisions of this Court, to which we shall refer and quote from hereafter.

While the question was squarely presented and fully

considered by the learned judge of the Circuit Court, we are constrained to say that the current of authority on this subject is not in accordance with that opinion. That opinion gave great weight, and as a basis of the argument therein, relied upon the case of *In re Sawyer*, 124 U. S. 200, but we have failed to find any case where there was involved the question of the right of a court of equity to enjoin prosecutions under invalid ordinances where property rights were affected, especially where they were acquired by legislative authority, that the courts have not held that equity had jurisdiction to enjoin prosecutions under such invalid ordinances.

In the case of *Suess v. Noble*, 31 Fed. Rep. 855, and in the case of *Minneapolis Brewing Company v. McGillivary*, 104 Fed. Rep. 258, relied upon by the learned judge of the Circuit Court in his opinion in this case there was no question as to the destruction or invasion of civil rights which had become vested under any legislative grant or authority. There had been no law making it lawful to engage in any of the business enterprises therein contemplated within a certain district and so far as the record discloses in those cases, the public authorities were simply endeavoring to enforce in good faith the penal provisions provided for in those statutes for the protection and preservation of the peace and good order of the community. With full knowledge of the power to pass such laws and that the municipal authorities would enforce them, the plaintiffs continued to acquire possession of the goods which they were dealing in and manufacturing and brought these actions for the sim-

ple purpose of testing the validity of the local laws and ordinances, ample opportunity of testing which was given in a criminal court without invading the domain of a court of equity in their behalf.

Between, however, the case of the *City of Atlanta v. Gate City Gaslight Company, supra,* the case of *Port of Mobile v. Louisville & Nashville Railway Company, supra,* the *City of Austin v. City of Austin Cemetery Ass'n, supra,* and other cases in that line that we quoted from in this argument, on the one hand, and the cases of *Suess v. Noble, supra,* and *Minneapolis Brewing Co. v. McGillivary, supra,* and *in re Sawyer, supra,* on the other hand, there is a wide difference and distinction.

In the Atlanta case the city stood by and saw the company making an outlay of $140,000 in the exercise of their rights under their charter without intimating to them that objection would be made to the use of the streets for the purposes authorized, and without the use of which their enterprise would not have been undertaken, and could not be prosecuted, and without which they would lose their entire outlay and be irreparably ruined. When the Gas Light Company was ready to begin the work of laying its mains the municipal authorities sought to prevent it from exercising its valuable vested corporate franchise by first refusing it permission to excavate and use the streets of the city for the purpose of laying its pipes and then threatened under certain city ordinances to prosecute and punish any of its agents or employes who, without such permission, should undertake to do so. The court

showed in that case, as we claim in the case at bar, that the permission of the city was not necessary to enable the complainant to exercise its franchise.

In the case at bar, relying in good faith upon the city ordinance of August 26th, 1901, and the permit granted by the Fire Commissioners to its employer, the appellant has gone ahead with its work, and in the erection of said gas works had expended a large amount of money between November 22nd, 1901 and March 3rd, 1902, and before the city took any action in the matter it had all the material upon the ground and had the work upon the gas holder nearly completed, and as was said by the Georgia case, upon every principle of equity, the failure to notify it or the intention of the city to stop the work until this heavy expenditure had been made would estop the city; that such conduct was fraudulent in the eye of the law and practiced upon an innocent party seeking *bona fide* to carry out its contract under rights then existing and thereby granted, would debar the city from now being heard. And as was held in the Atlanta case, the ordinance making penal the continuation of the work were void as affecting the vested rights of the appellant and its employer.

It was said by the Supreme Court of Georgia in the Atlanta case, *"where it is manifest* [as in this case] *that the punishment and arrest is threatened for an alleged violation of a city ordinance for the sole purpose of preventing the exercise of civil rights conferred directly by law, injunction is a proper remedy to prevent injury to the party thus menaced."* The distinguishing feature in the Atlanta case was the pat-

ent fact that the threatened prosecutions under the municipal ordinance were being used not for the legitimate purpose of preventing the streets of the city from being unlawfully injured or obstructed, but for the purpose of destroying the valuable vested franchise of the Gas Light Company.

Equity seeing the palpable fraud that was being perpetrated under color of what purported to be a simple police regulation stretched its strong arm to prevent the irreparable damage which would ensue if it did not afford its protection to the rights which were thus imperiled. It was long ago decided by this Court "that an injunction will be granted to prevent the franchise of a corporation from being destroyed, as well as to restrain a party from violating it by attempting to participate in its exclusive privileges." *Osborn v. Bank*, 9 Wheat. 738.

And the principle of all the cases that we have cited is this, that when damages will be irreparable if the threatened injury is not prevented and property rights are to be destroyed by means of void ordinances, that equity if properly appealed to will not permit such destruction of property rights whether vested in corporate franchises or in property rights belonging to individuals. And that by the mere device, as was said in *Port Mobile v. Louisville & N. R. Co.*, *supra.*, of adding a penalty to an illegal and void ordinance where property rights are involved, a municipal corporation cannot escape the grasp of a court of chancery.

In the case at bar, as in those cases, acting upon the good faith of the ordinance and rules and regulations of the City of Los Angeles, the em-

ployer of appellant acquired vested rights which cannot be destroyed by a void ordinance, though penalties are prescribed therein if it is violated, without relief being granted in a court of equity if properly sought. These cases we have cited do not conflict in any respect with the cases of *Suess v. Noble, supra,* and *Minneapolis v. McGillivary, supra,* because in these cases there was no destruction or invasion of civil rights which had become vested under legislative grants or authorities.

There is nothing inconsistent with the views for which we contend in the decisions of *In re Sawyer, supra,* or in *Harkrader v. Wadley,* 172 U. S. 148. *In re Sawyer* relates to removals from office and the question as to the jurisdiction of a court of equity was not directly involved. As to the discussion of this Court in that case of the want of jurisdiction in a court of equity over criminal proceedings, it was very aptly said by Mr. Justice Field in his concurring opinion that he "did not perceive its application to the present case."

It is not presumptuous on our part to say that case does not apply to the case at bar, and that it is not an authority in determinining the questions here presented. The proceedings that had been enjoined and for the violation of the injunction in which the petitioners in that case had been committed for contempt, were proceedings before the common council of the City of Lincoln, Nebraska, and were not criminal in any sense. The questions involved did affect property rights; and it was so determined by this Court.

While it is said by this Court in that case that a court of equity has do jurisdiction over the prosecution or punishment or pardon of crimes or misdemeanors, yet Mr. Justice Gray in delivering the opinion of this Court in that case recognized that a court of equity had jurisdiction to protect the rights of property. He says: (p. 210)

"The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of the rights of property."

Mr. Justice Gray also quotes with approval the case of *Sheridan v. Colvin*, 78 Ill. 237, where it was held that a court of chancery had no jurisdiction to restrain by injunction a city council from passing an ordinance unlawfully abolishing the office of Commissioner of Police.

The Supreme Court of Illinois in that case said:

"It is elementary law, that the subject matter of the jurisdiction of a court of chancery is civil property. The Court is conversant only with questions of property and the maintenance of civil rights. Injury to property whether actual or prospective, is the foundation on which the jurisdiction rests."

That Mr. Justice Gray recognized this question of property rights as being an exception to the rule laid down by him *in re Sawyer, supra*, that equity would not enjoin purely criminal proceedings *vide Central Trust Bank v. Gitizens' Street R. R. Co., supra.*

In the case of *Harkrader v. Wadley, supra,* there was no question as to the validity of the statute, and the proceedings were under a valid statute, and we have not contended that injunctions would lie to re-

strain an officer from proceeding under a valid statute.

The case of *Arbuckle v. Blackburn*, 113 Fed. Rep. 616, was like the case of *Harkrader v. Wadley, supra*, in that the defendant was not proceeding under an invalid law of the state, but under a valid law, his error being in wrongfully construing the statute so as to include the complainant's product.

This Court has recognized that a court of equity has jurisdiction over a case like the one now presented.

The case of *Smyth v. Ames*, 169 U. S. 466, was an action brought by certain stockholders of the Union Pacific Railroad Company to enjoin certain persons holding office in the State of Nebraska from enforcing certain penalties under certain acts of the Legislature of the State of Nebraska in reference to the regulation of railroads and classifying freights and fixing the maximum rates to be charged for the transportation of freights upon each of the railroads in the State of Nebraska, and providing penalties for a violation thereof. It was claimed that the acts were in violation of the Constitution of the United States. Mr. Justice Harlan, delivering the opinion of this Court said: (p. 517.)

"In these cases the plaintiffs, stockholders in the corporations named, asked a decree enjoining the enforcement of certain rates for transportation upon the ground that the statute prescribing them is repugnant to the Constitution of the United States. Under the principles which in the Federal system distinguish cases in law from those in equity, the Circuit Court of the United States, sitting in equity, can make a com-

prehensive decree covering the whole ground of controversy and thus avoid the multiplicity of suits that would inevitably arise under the statute. The carrier is made liable not only to individual persons for every act, matter or thing prohibited by the statute, and for every omission to do any act, matter or thing required to be done, but to a fine of from one thousand to five thousand dollars for the first offense, from five thousand to ten thousand dollars for the second offense, from ten thousand to twenty thousand dollars for the third offense, and twenty-five thousand dollars for every subsequent offense. The transactions along the line of any one of these railroads, out of which causes of action might arise under the statute, are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree, according to the prayer of the bills, would avoid a multiplicity of suits, and give a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law; for a court of law could only deal with each separate transaction involving the rates to be charged for transportation. The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency and determine, once for all and without a multiplicity of suits, matters that affect not simply individuals, but the interests of the entire community as involved in the use of a public highway and in the administration of the affairs of the quasi-public corporation by which such highway is maintained."

In the case of *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, it was contended that the bill did not disclose any actual proceeding on the part of the city to displace the complainant's right under contract, that mere apprehension that a legal action might be taken by the city cannot be basis for enjoining such action, and that, therefore, the Circuit Court

did right in dismissing the bill. In reference to this, this Court said, p. 82:

"We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties; in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights."

The case of *Detroit v. The Detroit Citizens' Street Railway Company*, 184 U. S. 368, was a bill in equity filed by the railroad company for the purpose of obtaining an injunction to restrain the city of Detroit and the individual defendants from enforcing certain ordinances of the common council of the city, adopted in 1899, reducing fare on the various city railways of the complainant on the ground that such ordinances were in violation of the federal constitution because they impaired the obligations of contracts theretofore entered into between the city and the predecessors of the plaintiff. The Circuit Court of the United States granted an injunction and the defendants appealed to this Court. In delivering the opinion of this Court in that case, Mr. Justice Peckham said:

"A question has arisen at the outset as to the jurisdiction of a court of equity over a case like the one now presented. Assuming the right to relief in some form, has the complainant a plain and adequate remedy at law, or is the case such in its nature and in the relief demanded as would be cognizable in a court of equity? The foundation of the right of action lies in the alleged invalidity of the ordinances of 1899, reducing the rates

of fare on the railways of the complainant, because, as averred, those ordinances are in violation of the Federal Constitution, as impairing the obligation of contracts between the parties already existing, and therefore the claim is made that they should not be permitted to be enforced against the complainant where such enforcement might result in a multiplicity of suits, or in harassing and expensive litigation.

"The averments in the complainant's bill upon this subject, which are set forth in the above statement of facts, show the additional and special grounds upon which the jurisdiction in equity is invoked. Of course, if the complainant obey these ordinances, no controversy can arise, but if in good faith it believe them to be invalid and hence not binding upon it, and without resorting to the courts for equitable relief, it refuses to obey them, the consequences may be not only embarrassing but may lead to much unnecessary and expensive litigation. Continuous demands for the tickets mentioned in the ordinances at the reduced price therein provided for may be made by passengers while in the cars of the complainant, and they may refuse to pay fare at the old rate, and may carry such refusal to the point of suffering removal from the cars on account of nonpayment of fare. What amount of force would be necessary in the opinion of the various passengers to demonstrate that their going was not voluntary would of course give rise to disputes between them and the conductors, and would possibly, if not probably, lead to frequent breaches of the peace in the course of these attempts at removal. If not removed, then the passengers would either pay no fare or the complainant would have to accept the fare as provided in the ordinances of 1899, and that would be the same in fact as submitting to their enforcement.

"The roads operated by complainant are also indebted to an extent of over eight million dollars, secured by mortgages upon the railways, their franchises, rights and privileges, together with the tolls and fares, earnings and profits arising therefrom, and some of this indebtedness is soon to mature, and it is admitted that the bonds issued as evidence of such indebtedness

and secured by its mortgages were so issued and sold to and purchased by the holders thereof in the full faith and belief that the various roads represented by the complainant had the right to charge the rates of fare fixed by the ordinances already mentioned; such belief being based upon the existence and terms of such ordinances.

"The ability of the complainant to renew or extend its mortgage indebtedness might depend upon belief in the validity of the contracts as to the rates of fare agreed upon before the attempted alteration thereof by the ordinances of 1899. The immediate enforcement of these later ordinances might result in such a decrease of income as to seriously imperil the solvency of the complainant. An equitable action like this would certainly be more adequate and offer more effective and immediate relief than for the complainant to await the various actions at law to which it would otherwise be subjected by the defendants and the individuals demanding the reduced rates for transportation.

"The mayor and corporation counsel here, as is seen, been joined with the city as defendants in the suit. The reason for the joining of the individual defendants would seem to be that they are the officers upon whom would devolve the execution of the ordinances passed by the common council, and in the answer of the defendants it is admitted that they intend to enforce obedience by the company to such ordinances. The case is similar in some of its aspects to that of *Smyth v Ames*, 169 U. S. 466. It is true there are no penalties fixed in the ordinances for disobedience to their commands on the part of the company, but the bill shows that there are a large number of passengers carried over the roads of the complainant daily, amounting to many thousands, each of whom would have the right to demand transportation at the rates provided for by the ordinances in case they were valid. As is said in *Smyth v. Ames*, page 518, 'The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the stat-

ute. Only a court of equity is competent to meet such an emergency, and determine, once for all, and without a multiplicity of suits, matters that affect, not simply individuals, but the interests of the entire community as involved in the use of a public highway and in the administration of the affairs of the quasi-public corporation by which such highway is maintained.'

"While this is not such an extreme case, and there are no penalties provided in the ordinances for disobedience, yet the same principle applies.

"It is a matter of general public interest, as well as of vital importance to the complainant, that the question involved in this litigation should be determined at the earliest possible moment, and once for all, and thus a multiplicity of suits and other complications prevented.

"Taking all these facts into consideration, and bearing in mind that the answer does not set up any defense of the lack of jurisdiction of a court of equity over the subject-matter, and does not insist that there is an adequate and plain remedy at law, (and no such objection has been taken at any time, and has not been insisted upon before us,) we do not feel compelled, under the peculiar circumstances of the case, to ourselves take notice of it.

"It is not such a case as on its face equity could have no jurisdiction over, such as an action to recover damages for an assault, or for a libel or slander, but the question between the parties as to the validity of various ordinances and the right of the city to enforce them, involving, as they may, the credit and possibly the solvency of the complainant, and taking into consideration the public interests involved in a speedy and final determination of the question, all these as well as other facts already mentioned, we think, make out a case for the following general rule, that a defense of this nature will not be recognized where it has not been taken by answer or in any other manner, and is not insisted upon on the hearing before the court. *Reynes v. Dumont*, 130 U. S. 354; *Kilbourn v. Sunderland*, 130 U. S. 505; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530.

"We do not mean to assert that in all cases of this nature, involving simply the validity of a subsequent ordinance or law, a court of equity would be the proper forum, but confine our decision to the special facts of this case, including the fact that no objection has been taken to the jurisdiction of the court at any stage of the litigation, and is not now raised by any party to the same."

We recognize the fact that this Court in this case noticed the fact that the answer did not set up any defense of the lack of the jurisdiction of a court of equity over the subject matter nor was it insisted that there was an adequate and plain remedy at law and that no such objections were taken at any time or insisted upon before the court, and that a defense of this nature would not be recognized where it was not taken up by answer or in any other manner or insisted upon on the hearing before the court in a case over which on its face equity had jurisdiction. But it will be noticed on an examination of that case that it was a case, as the case at bar, over which equity would have jurisdiction under well recognized principles of equity jurisprudence. In that case the foundation of the right of action was in the alleged invalidity of the ordinance of 1899 reducing the rates of fare on the railways of complainant because, as averred, those ordinances were in violation of the Federal Constitution as impairing the obligations of contracts between the parties already existing, and therefore the claim was made that they should not be permitted to be enforced against the complainant when such enforcement *might result in a multiciplicity of suits*

or in harrassing and expensive litigation. In addition to this it was determined by this Court that the immediate enforcement of these later ordinances might result in such a decrease of income as to seriously imperil the solvency of the complainant, and thus result in irreparable loss to the complainant. It was a matter of public interest that the litigation should be determined at the earliest possible moment and once for all, and thus a multiplicity of suits and other complications prevented.

These are well recognized and fundamental principles upon which equity jurisdiction often depends, as shown by the cases from which we have quoted at length and was the basis upon which the injunction was granted in those cases. It is the very foundation of the case at bar and whether the question is raised by the demurrer or not, does not take it out of those well recognized and fundamental principles of equity jurisprudence. Jurisdiction is not granted by consent or refused by objection of the defendant. It is determined upon larger principles and considering the expressions of this Court in the cases of *Smyth v. Ames, supra, Vicksburg Water Works Co, v. Vicksburg, supra,* and *Detroit v. Detroit Citizens' Street Railroad Company, supra.*

We firmly believe that as this case is now fairly presented to this Court it will sustain the jurisdiction of a court of equity to enjoin the enforcement of void city ordinances to prevent a multiplicity of actions, or to protect property rights injuriously affected or im-

paired thereby, especially when said rights have been acquired under legislative authority.

The fact that municipal and city regulations are usually rendered effective by making their violation punishable offenses does not militate against the jurisdiction of a court of equity to protect against invasion by invalid ordinances all property rights.

This Court in the case last cited well decided that the presence or absence of penalties for disobedience of the ordinance did not alter the principle and confining the question before the court to the principle, as we have stated it, that courts of equity will enjoin the enforcement of void city ordinances to prevent a multiplicity of actions or to protect the property rights injuriously affected or impaired thereby, especially when they are acquired under legislative authority, gives no cause for alarm that courts of equity would be found "exercising supervisory power over the administration of a part, not inconsiderable, of the criminal laws of the country."

The case made by the bill presents strong claims for equitable interference. The municipal authorities of the City of Los Angeles, in violation of all the rights of appellant and its employer, passed ordinances that absolutely prohibited the erection of the work in which the appellant was engaged and attempted to intimidate and coerce those engaged in the work to submit to their lawless exactions and stop all work in which the appellant and its employes were engaged by arrests and threats of fine and imprisonment. The city authorities have already four times arrested the employes of appellant and solemnly avowed that it

was their intention to keep on arresting them daily until they stopped and desisted from all work upon the enterprise in which they were engaged. We have shown that they were engaged, at the time of the passage of this ordinance, in a lawful occupation.

The plaintiff has no remedy against the defendant for damages, for in the absence of a statutory provision in the State of California imposing the liability, a municipal corporation is not liable for the misfeasance, malfeasance or nonfeasance of its officers.

The defendant was not liable for the wrongful arrest and imprisonment by its officers of the employes of the appellant, or forcing the appellant to desist and cease from the work of constructing the gas works. *Stedman v. San Francisco*, 63 Cal. 193; *Chope v. Eureka*, 78 Cal. 508; *Doeg v. Cook*, 126 Cal. 213.

The complainant has no speedy and adequate remedy at law and it is a fundamental principle of equity jurisprudence that a remedy at law must be as practical and efficient to the ends of justice, and its prompt administration as the remedy in equity.

The long delays incident to the trial of actions at law when the men are arrested, before the magistrate, on appeal, on habeas corpus and on writs of error, with work delayed, contracts unfulfilled and heavy damages incurred, and the appellant, perhaps, ruined, the remedy at law is not such an adequate remedy as may be had in equity, where once for all, and without a multiplicity of suits, matters that affect not simply the appellant, but its employer and the interests of

the entire community, involved in public utilities such as are described in this complaint, may be determined. The public have a large interest in the protection of the rights which they have granted under their constitutional franchise.

In the case of *Boyce's Executors v. Grundy*, 3 Peters, 377, this Court, referring to the sixteenth section of the judiciary act prohibiting suits in equity where there is a plain adequate remedy at law, said:

That that section was "merely declaratory on the subject of legal remedy. It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity."

In the case of *Walla Walla City v. Walla Walla Water Company*, 172 U. S., 1, 12, this Court also said:

"This Court has repeatedly declared in affirmance of the generally accepted propostion that the remedy at law, in order to exclude a concurrent remedy at equity, must be as complete, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity. *Boyce's Executors v. Grundy*, 3 Pet. 210, 215; *Ins. Co. v. Bailey*, 13 Wall. 616, 621; *Kilbourn v. Sunderland*, 130 U. S. 505, 514; *Tyler v. Savage*, 143 U. S. 79, 95."

If "courts of equity did not interfere in cases of this sort, there would be a great failure of justice in this country." 2 Story, Eq. Jur., Sec. 928.

We may therefore conclude that when property rights are involved a court of equity may enjoin the enforcement of a void city ordinance to prevent a multiplicity of actions or to protect the property rights in-

juriously affected or impaired thereby, especially where property rights are acquired under legislative authority.

We should be suspected of purely personal motives in this matter if we did not recognize the importance of these questions thus presented and how far reaching may be the decision of this Court in determining them in accordance with the sentiments and arguments we have advanced. They are important to appellant and more particularly to its employer, Mrs. Caroline W. Dobbins, because of the large interests involved; but they also affect the interests of a large and prosperous community in which it is proposed by her to conduct the business of supplying a public utility, a right which is granted and protected by the Constitution of the State of California. They affect also all other business enterprises, not only of the state of California, but of this entire country where vested rights are to be maintained as sacred; for if vested rights are no longer inviolable, but may be put in jeopardy at any time by the will and caprice of the municipal authorities, and no remedy is provided for speedy and adequate relief, property rights may be destroyed and their use perverted. It would be a most dangerous precedent to hold that all property was subject to the mere will and fiat of the municipal authorities, and that a court of equity had not jurisdiction to protect property rights threatened with destruction by the attempted enforcement of invalid municipal ordinances. Large enterprises would not be undertaken without the security given and the protection afforded by the inviolability of contracts and

the prompt and efficient protection afforded by a court of equity.

The submission of these questions to this Court is with the full understanding that their importance is fully appreciated, and that they will be decided so as to sustain at once the best interests of the entire country and protect the fundamental rights of the citizens thereof. There need be no fear that courts of equity will be called upon to supervise the administration of the criminal laws of the land. Experience has taught us that there can be no great danger from this source, for if the doors of a court of equity are ever open to prevent threatened injury to property rights, that fact will be appreciated by legislative and municipal authorities, and attempts to prostrate the rights of the people will not be seriously contemplated. It should be a principle of equity jurisprudence that a remedy is not to be denied, because it has never before been granted.

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